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Brf. of Thomas, Bryant & Lee for

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SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1901.

JOSEPH H. BEALS,
Plaintiff in Error,
vs.
JAMES J. CONE AND LYMAN ROBISON,
Defendants in Error.

Term No. 300.

Error to the Supreme Court of the United States.

BRIEF OF DEFENDANTS IN ERROR
On Motion to Dismiss for Want of Jurisdiction.

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The defendants in error especially appearing for the purposes of this motion, by Charles S. Thomas, their attorney, now come and move this Honorable Court to dismiss said writ of error and affirm the judgment and decree of the said Supreme Court of the State of Colorado. And the said defendants in error assign the following reasons as the basis of the said motion:

First. Because the record discloses the existence of no Federal question essential to confer jurisdiction of the cause upon this Court under the 25th section of the Judiciary Act or any amendment thereto, or under any other Federal statute or rule of this Honorable Court.

Second. Because the plaintiff in error did not present, or presume to present, any such question or assert its existence before the said Supreme Court of the State of Colorado.

Third. Because no such question is disclosed in or by the decision of the said Supreme court or its decision of the petition for hearing thereof.

Fourth. Because of other matters and things appearing on the face of the transcript of record and disclosing the absence of any right or jurisdiction of this Honorable Court to preside therein.

WHEREFORE, the defendants in error pray that the said writ of error be dismissed and the judgment below be affirmed to the cost of plaintiff in error, to be taxed.

CHARLES S. THOMAS,
WM. H. BRYANT,
HARRY H. LEE,
Attorneys for Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

On Motion to Dismiss for Want of Jurisdiction.

Section 709, Revised Statutes of the United States, provide that "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had; where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against the validity, or where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set apart or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error," etc.

Under the provisions of this section the case at bar has been removed to this court, and its jurisdiction invoked for the correction of alleged errors in the decision of the Supreme Court of the State of Colorado. The case is an ordinary one of ejectment,

brought by the plaintiff as the owner of the Tecumseh against the defendants as the owners of the Ophir lode location at Cripple Creek, Colorado, to determine the right of possession of the premises in controversy pursuant to section 2326 R. S. U. S. The substantial facts in the controversy are that the defendants in 1892 applied for patent to and made entry of the Ophir lode. In 1893 the plaintiff protested against the entry for a number of reasons set forth therein, and after a hearing ordered thereon the entry was canceled. This decision of the commissioner having been affirmed by the secretary, the defendants made a second application for patent, whereupon the plaintiff filed his adverse and brought this action in support of it. The trial resulted in a verdict and judgment for the defendants. An appeal was taken to the Supreme court, which affirmed the judgment, and denied a petition for rehearing after ordering argument therein. The plaintiff in error has assigned twenty-three errors to the record of the State court. Two of them relate to the pleadings, one to the exclusion as evidence of the decisions of the Secretary of the Interior relating to the former entry of the Ophir, one to the exclusion of the original location certificate of the Tecumseh claim, six to instructions given and refused, one to the action of the court in sustaining the testimony in the record concerning annual labor or improvements, one concerning the inspection of the premises by the jury, two concerning the manner of the selection of the jury, two to the action of the jury after the case was submitted, one to alleged newly discovered testimony

reflecting upon the credibility of a witness, one to the rejection of certain rock samples as rebutting testimony, one to the necessity of a vein or lode in the discovery shaft, one that the evidence supported the verdict, one that a re-location of a forfeited claim was essential to the enforcement of such forfeiture in favor of a claimant of the premises, one that the court "erred in holding that willful use of false testimony, and the manufacture of fictitious evidence by what is known as the 'salting' of the Ophir shaft was not a ground of reversal," and one to the final decision of the Supreme court. In none of these is there any question whatever relating "to the validity of a treaty or statute of or an authority exercised under the United States or the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States," nor to "any title, right, privilege or immunity claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States." Consequently the Supreme Court of Colorado did not make and could not have made any decision either for or against any one of these enumerated propositions, and the jurisdiction of this court over the controversy disappears. There being no jurisdiction, we could not if we would confer it by consent.

Mills vs. Brown, 16 Peters, 525.

The only approach to a Federal question that the record reveals is the attempted application of the

decision of the Secretary of the Interior in the former entry to the determination of the succeeding one. But this approach is apparent only, as the entire question is one of pleading merely. In his replication to our answer, the plaintiff attempted to plead the decision referred to as *res adjudicata*, and the testimony of the defendant Cone in that proceeding as an estoppel. These pleas were so defective and insufficient that the defendant's demurrer to them was sustained, and the plaintiff did not even offer to amend them.

The action of the trial court in striking out these replications was assigned for error to the Supreme court of the State, and the action of the court below was approved in the following language:

> "It will be borne in mind that the application of appellees for patent to the ground in controversy adversed by appellant is in no manner based upon the proceedings resulting in an entry which was canceled as above pleaded, nor do they in any manner base their rights to the ground in controversy by virtue of such application or the entry thereunder which was afterwards annulled. The claim of counsel for appellant is that the judgment of the Land Department is *res judicata* of the facts established in the proceeding instituted by appellant and others protesting against such entry. In order to constitute a judgment in one action *res judicata* in another it must appear that the quality of the parties to each is the same: Slocum vs. DeLizardi, 99 Am. Dec. 740; Railroad Co. vs. Commissioners, 12

Kan. 127; Freeman Judgm., sec. 252; Bouv. Law Dic., tit '*Res Judicata*'; Benz vs. Hines, 3 Kan. 390; Lower Latham Ditch Co. vs. Loudon Irr. Canal Co., 60 Pac. 629. The judgment rendered by the Land Department in the matter of the former entry of the land in controversy in no manner settled the rights of the parties to that proceeding to such lands. It merely held that appellees were not entitled to be vested with the fee therein from the general government. The protestants were not parties in interest, because they made no claim to the subject matter of the controversy, and with respect to that proceeding occupied the position of *amici curiæ*, with the right of showing that appellees had not complied with the requirements of the law relative to obtaining title from the government for mineral lands at the time of their former application. Weeks' Min. Lands, sec. 96; *In re* Mt. Pleasant Mine, Copps U. S. Min. Lands, 222. It is manifest, therefore, that the quality or capacity in which appellant acted in the protest proceedings pleaded is entirely different from the capacity in which he appears in the present action."

The court might have added that no right of the protestant was possibly affected by the decision and no right claimed by him had been founded therein. He was not urging the claims of the Tecumseh, but contending that as between the protestees and the government the former should not receive patent for the Ophir. In another part of the opinion, and when

discussing the objections to the action of the trial court in excluding the secretary's opinion as evidence for the plaintiff, the court touches upon this question, and correctly determines that the cancelation of the first Ophir entry was in effect but a judgment of nonsuit, leaving the applicants precisely where they would have been if they had never filed patent proceedings. The soundness of this position cannot be successfully challenged, the case being entirely different from those in which the findings of the Land Department have been held conclusive, the question involved in such cases being "the authority of the courts to redetermine questions of fact already determined by the department where parties either based their right upon a muniment of title issued by the government which had been annulled, or were attempting to show that the facts upon which a patent had been issued were different from those necessarily established before the department, upon which it based its action." How this becomes a Federal question is not at all clear.

The so-called plea of estoppel, considered from a jurisdictional standpoint, is still more remote. The testimony of Cone, which forms its groundwork, was given before Federal officers, but that circumstance cannot affect its legal character. If it constitutes an estoppel it is due to the inherent nature of the testimony, and not to the conditions under which, or the manner in which, it was given. But, as before stated, the question is one of pleading, and the State court held the replication deficient. "In order," says Justice Gabbert, "to sufficiently plead an es-

toppel *in pais*, based upon statements, it must be averred, among other things, that the statement relied upon to constitute such estoppel was made with the intention that it should be acted upon. Patterson vs. Hitchcock, 3 Colo. 533; People vs. Brown, 67 Ill. 435; Martin vs. Zellerbach, 38 Cal. 300. In the replication interposed by appellant on this subject there is no averment that the statements attributed to the appellee Cone were made by him with the intention of deceiving or misleading appellant or those acting with him, nor is there any allegation that supplies the absence of a direct one to this effect. The demurrer to each plea in the replication was properly sustained." In its opinion denying the plaintiff's petition for a rehearing the court calls attention to another important element necessary to an estoppel *in pais*, and that is, that the person to whom the statement is made was ignorant of the truth of the facts to which the estoppel relates. The plaintiff might have prepared a more defective plea of estoppel than the one under discussion, but it is to be hoped that he never did.

The record shows that plaintiff was permittted to introduce this testimony of Mr. Cone, that the parties interested with him made their own examination of the Ophir shaft and were neither influenced by Mr. Cone's statement nor ignorant of the things to which his testimony relates. They admit, and Mr. Cone swears, that in the spring of 1894 Mr. Cone posted a notice on the windlass frame of the Tecumseh shaft declaring himself and Robison to be the owner of the Ophir location covering the premises,

and warning all people against doing any work or making any claim thereon at their peril. A claim of estoppel, under the circumstances, independent of the question of jurisdiction, sounds absurd.

Nothing else contained within the plaintiff's assignment of errors is affected in the remotest degree by the provisions of § 709. The trial court gave the jury its definitions of a vein, lode or ledge as the terms are used in the Federal mining law, and the term crevice, as it is used in the State mining law, it declared the question whether defendant had complied with the statutory requirement of a hundred-dollar expenditure in 1897 to be one of fact which the jury must determine from the evidence and admitted testimony on the subject, notwithstanding the year in controversy elapsed subsequent to the bringing of the suit and no supplemental pleading concerning it had been filed. It properly told the jury that even though forfeiture may have occurred through the inaction of the defendant, the plaintiff could take no advantage of it until he had relocated the ground, inasmuch as the defendants could do the required work any time before the rights of third parties had accrued. The court also declared that the discovery of a vein in the discovery shaft of the claim was essential to its validity in Colorado as against the intervening rights of others. In thus determining the law and the soundness of the instructions given to the jury by the trial court, no error was committed, nor any Federal question involved. The decision which we publish for the convenience of this court, at the end of this argument, contains abundant rea-

sons and quotes numerous authorities to sustain its several conclusions. It seems superfluous to discuss the question of jurisdiction. The plaintiff in error presented no such question to the Supreme Court of Colorado prior to his petition for a rehearing, and then challenged the soundness of a State statute whose validity he had admitted in argument. Of course, if the question said to be a Federal one was not called to the attention of the State court, and prior to any motion or petition for rehearing, no writ of error can lie to such court.

Loeber vs. Schroeder, 149 U. S. 581.

Texas Pac. Co. vs. Southern Pac. Co., 137 U. S. 48.

Butler vs. Gage, 138 U. S. 52.

Winona R. R. Co. vs. Plainview, 143 U. S. 39.

Bushnell vs. Crooke Mining Co., 148 U. S. 682.

Lieper vs. Texas, 139 U. S. 462.

Lamar Co. vs. Amity Co., 26 Col. 380; s. c., 77 Am. St. R. 268.

Armstrong vs. Athens County, 16 Peters, 281, is a leading case upon the subject. It is there decided that the question giving this court jurisdiction must be shown, "first, either by express averment or necessary intendment in the pleadings in the cause, or, second, by direction given by the court and stated in the exception, or, third, under the laws of Louisiana (where the case arose), by a statement of

facts usually made in such cases by the court, or, fourth, it must be entered on the record of the proceedings in the Appellate court in cases where the record shows that such a point may have arisen and been decided that it was, in fact, raised and decided, and this entry must appear to have been made by the order of the court or the Presiding Judge by order of the court, and certified by the clerk as a part of the record in the State court, or, fifth, in proceedings in equity it may be stated in the body of the final decree of the State court from which the appeal is taken to this court, or, sixth, it must appear from the record that the question was necessarily involved in the decision, and the State court could not have given the judgment or decree which they passed on, without deciding it." This court will not resort to forced inferences and conjectural reasoning, or to even probable suppositions of the points raised and decided in order to sustain jurisdiction.

Ocean Ins. Co. vs. Polley, 13 Peters, 157.

A mention of a Federal question in the petition for the writ of error is insufficient to give the Supreme court jurisdiction.

Lieper vs. Texas, 139 U. S. 462.
Tuppe vs. R. R. Co., 147 U. S. 126.

The record MUST SHOW AFFIRMATIVELY that some Federal question was involved.

Brown vs. Colorado, 106 U. S. 95.

Bonton vs. Bank, 104 U. S. 427.

R. R. Co. vs. R. R. Co., 19 How. 378.

The definitions given by the State court to the term "vein or lode" in the Federal mining statute and the necessity of their presence in the discovery shaft of a mining claim do not of course invest this court with power to review the decision. A similar contention was made in Bushnell vs. Crooke Mining Co., 148 U. S., cited *supra*, brought here on error to the same court which decided this. This court said, by Mr. Justice Jackson:

> "After the decision had been rendered by the Supreme court of the State, a petition for rehearing was presented by the plaintiffs in error, which for the first time sought to present the question whether § 2322 of the Revised Statutes of the U. S. gave to the appellants 'the exclusive right of possession and enjoyment of all other veins and lodes having their apexes within the Monitor surface ground, which would give to these appellants beyond all question the so-called Enterprise that is alleged to cross the Monitor on the surface; and certainly a vein that is thus our own cannot be used by one who has no interest either in the Monitor or Enterprise titles to create any question of lode crossing between them, or any other question of conflict. Under such circumstances there is but one grant and it is all the Monitor grant and its right and title, and such grant is in nowise severable into a part Monitor and a part Enterprise, no sep-

arate life or vitality being given to the said so-called Enterprise."

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any Federal question, and an examination of the opinion of the Supreme court affirming the action of the trial court as to instructions given, as well as its refusal to give instructions asked by the defendant below, fails to disclose the presence of any Federal question. It does not appear from the record that any right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon by the Supreme court of the State, nor does it appear from anything disclosed in the record that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States."

"The decision of the Supreme court of Colorado in no way brought into question the validity or even construction of any Federal statute, and certainly it did not deny to the plaintiffs in error any right arising out of the construction of the Federal statutes. It was said by the chief justice in Cook County vs. Calumet & Chicago Canal Co., 138 U. S. 635, 653, 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.'"

No jurisdiction to review can attach to this court simply because the plaintiffs in error may have claimed a right under a Federal statute. "It should not be overlooked," said the court, in Blackburn vs. Portland G. M. Co., 175 U. S. 586, "that §§ 2325 and 2326 form a part of a general scheme in reference to the mineral lands of the United States. That scheme is contained in chapter six of the Revised Statutes of the United States, and includes sections from 2318 to 2352." In that case the decisions of the court in Colorado Central M. Co. vs. Turck, 150 U. S. 138, and Gillis vs. Stinchfield, 159 U. S. 658, both mining cases, are cited and approved. The latter case is expressly declared, page 585, to be "authority for the proposition that controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the State courts, and that to enable this court to review the judgment in such a case it must appear not only that the application of a Federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties"

The definitions given by the trial court in the case at bar of the terms used in the Federal mining statutes and approved by the Supreme court have been sanctioned by judicial authority, both Federal and State, ever since the statute was enacted. To cite the authorities containing these sanctions would be at this time superfluous. They begin with the famous Eureka Richmond case in 1877, and end with the last controversy in which the subject was in-

volved. If because the necessity for the finding a vein or lode obtrudes itself into a mining controversy a Federal question is thereby presented giving the Federal tribunal jurisdiction for trial or review, it would follow that any mining case would sooner or later find lodgment in the Federal courts and the State courts deprived of all jurisdiction over them. The same would be true of all other controversies arising under a Federal statute, no matter how frequently and decisively it may have previously been construed.

In California Oil Co. vs. Miller, 96 Fed. R. 17, a suit to quiet title to a mining claim was held to involve no federal question; indeed, the cases on the subject are too familiar to need or to justify citation. Only the latest ones will therefore be referred to.

In Shoshone Mining Co. vs. Rutter, 177 U. S., a suit brought in support of an adverse claim under §§ 2325, 2326, was held to be one not arising under the laws of the United States in such sense as to confer Federal jurisdiction. "The suit," says Mr. Justice Brewer, "is to determine the question of the right of possession. That right may or may not involve the construction or effect of the Constitution or a law or treaty of the United States." The cases in which such construction is involved are comparatively few, as the learned justice declares, and the opinion is one whose reasoning cannot be resisted or turned from the record under consideration.

An assignment of error in this court that the decision of a State Supreme court was inconsistent with certain paragraphs of an alleged brief putting

forward a Federal question does not amount to a compliance with the requirements of § 709, R. S. When a Federal question is raised in the State courts the party who brings the case to this court cannot raise here another Federal question which was not raised below.

Chapin vs. Fye, 179 U. S. 127.

If the decision of the State court is based upon a state of facts which remove the alleged Federal question out of the case, this court has no jurisdiction to review.

R. W. Co. vs. Ferris, 179 U. S. 602.

And see

R. R. Co. vs. Adams, 180 U. S. 41.

We conclude with one more reflection.

If the decision of the State court rests on an independent ground of law, not involving any Federal question or on a ground broad enough to sustain it, without reference to such a question, the Supreme court has no jurisdiction.

Eustis vs. Bolles, 150 U. S. 361.

Dower vs. Richards, 151 U. S. 658, 666.

Mo. Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556.

Osborne vs. Florida, 164 U. S. 650.

Wade vs. Lowder, 165 U. S. 624, 628.

Running throughout the record and the decision is the contention that the defendant's location rested upon a mineral discovery, senior and superior to that of the plaintiff. A great mass of testimony given by a large number of witnesses on this question was submitted to the jury out of which two facts prominently emerge. One is the conceded existence of a vein in the Ophir discovery shaft, the other the positive although controverted assertions of the defendant's witnesses that neither vein nor mineral was disclosed in that of the Tecumseh. The court told the jury that if it "believed from the evidence that the defendants or their grantors are now, and that on or about the 3rd day of February, 1892, were citizens of the United States, and that on or about the said 3rd day of February, 1892, or at any time before there accrued the rights, if any, which the plaintiff has acquired to the ground in controversy under the Tecumseh lode, or if no such rights were acquired, they at any time before the bringing of this action made a valid location of the said Ophir lode, as a valid location has been defined to you herein, then it should find the issues joined herein for the defendants." Instruction No. 8.

Again: "The court further instructs you with reference to the acquisition of title to mineral land, the primal fact is the discovery of mineral, and he who first discovers it on a claim is first in right, and can claim the same provided he follows up the discovery of mineral by those acts required to be done by the rules and regulations of miners and laws of

the State and the United States." Instruction No. 15.

Again: "You are further instructed that the plaintiff cannot recover in this action upon any location or possession of the ground in controversy prior to the 25th day of April, 1894. His first location certificate has been excluded from your consideration, and the only record or evidence of title for your consideration alleges a discovery as of said date. It is upon that location and the alleged discovery that the plaintiff must recover if at all." Instruction No. 20.

And yet again: "The plaintiff in his complaint claims title to the Tecumseh lode mining claim by virtue of an alleged discovery of a vein therein about the first of January, 1893. The defendants in their answer claim title to the Ophir location upon the alleged discovery of a vein or lode therein on or about the 3rd day of February, 1892. It is admitted by the plaintiff that prior to the 20th day of April, 1894, no lode vein or ledge was discovered within or upon said Tecumseh lode mining claim as contemplated by the statutes; and it is admitted by the defendants that on the 3rd day of February, 1892, no discovery of any vein had then been made in the Ophir discovery shaft. You are therefore to determine from the evidence which of said shafts has disclosed such a vein, lode or ledge, if any was disclosed within their respective discovery shafts." Instruction No. 22.

The jury accepted the defendant's contention that they had discovered a vein or lode in the Ophir,

and that the plaintiff had not done so in the Tecumseh, and found accordingly. This plain question of fact is conclusive of the case, supports the verdict and judgment, and makes the claim of a Federal question superfluous. The decision of the Supreme court of Colorado affirming that judgment rests, therefore, not only upon "an independent ground of law not involving a Federal question," but also "upon a ground broad enough to sustain it without reference to such question, even if one were involved." We respectfully ask, therefore, that the writ of error be dismissed and the decision affirmed.

CHARLES S. THOMAS,
WM. H. BRYANT,
HARRY H. LEE,
Attorneys for Defendants in Error.

APPENDIX.

BEALS VS. CONE,
SUPREME COURT OF COLORADO.

Opinion.

GABBERT, J. By way of replication to the answer and counterclaim of appellees, appellant interposed (1) what purported to be a plea of *res judicata*, and (2) a plea of estoppel *in pais*. By the first it was averred, in effect: That on February 10, 1893, appellees entered the Ophir lode. That thereafter appellant and others filed a protest against such entry, by which it was alleged that no discovery of mineral thereon had been made. That a hearing on such protest was had, which resulted in a finding by the Land Department of the general government that no discovery had been made on the Ophir; that the discovery shaft thereon was but twenty-five feet in depth on the 11th day of October, 1893; that the sinking of such shaft was the only work performed by appellees on the Ophir prior to that date. And that on these findings a judgment was entered canceling the entry. By the second plea it was averred: that the appellee, J. J. Cone, at the hearing above referred to, testified, in substance, that the discovery

shaft on the Ophir was but 25 feet deep on the 11th day of October, 1893; that no vein had been disclosed thereon at that time, and that no work had been performed on the claim in the year 1893. That by reason of such testimony appellant, and others interested with him, were induced to spend a large sum of money in exploring for mineral in the ground in conflict between the Tecumseh and Ophir lodes, and in working and developing the former. That appellees knew that such expenditure was being made on the faith of the truth of the above statements of appellee Cone, but never contradicted such statements. That if appellees performed any work on the Ophir in the year 1893, prior to the 11th day of October of that year, sunk the shaft to a greater depth than 25 feet, or discovered a vein in such shaft, appellant, and those working under him, were ignorant of such facts. To each of these pleas a general demurrer was interposed and sustained. This ruling of the trial court is assigned as error. It will be borne in mind that the application of appellees for patent to the ground in controversy, adversed by appellant, is in no manner based upon the proceedings resulting in an entry which was canceled, as above pleaded; nor do they in any manner base their rights to the ground in controversy by virtue of such application, or the entry thereunder, which was afterwards annulled. The claim of counsel for appellant is that the judgment of the Land Department is *res judicata* of the facts established in the proceeding instituted by appellant and others, protesting against such entry. In order to constitute a judg-

ment in one action *res judicata* in another, it must appear that the quality of the parties to each is the same. Slocum vs. DeLizardi, 99 Am. Dec. 740; R. R. Co. vs. Commissioners, 12 Kan. 127; Freem. Jgm., § 252; Bouv. Law Dict. tit *(res judicata)*; Benz vs. Hines, 3 Kan. 390; Lower Latham Ditch Co. vs. Louden Irr. Canal Co., 60 Pac. 629. The judgment rendered by the Land Department in the matter of the former entry of the land in controversy in no manner settled the rights of the parties to that proceeding to such lands. It merely held that appellees were not entitled to be vested with the fee therein from the general government. The protestants were not parties in interest, because they made no claim to the subject matter of the controversy, and with respect to that proceeding occupied the position of *amici curiæ*, with the right of showing that appellees had not complied with the requirements of the law relative to obtaining title from the government for mineral lands at the time of their former application. Weeks Min. Lands, § 96; *In re* Mt. Pleasant Mine, Copps U. S. Min. Lands, 222. It is manifest, therefore, that the quality or capacity in which appellant acted in the protest proceedings pleaded, is entirely different from the capacity in which he appears in the present action. In order to sufficiently plead an estoppl *in pais*, based upon statements, it must be averred, among other things, that the statement relied upon to constitute such estoppel was made with the intention and should be acted upon. Patterson vs. Hitchcock, 3 Colo. 533; People vs. Brown, 67 Ill. 435; Martin vs. Zellerbach, 38 Cal. 300. In the re-

plication interposed by appellant on this subject there is no averment that the statements attributed to the appellee Cone were made by him with the intention of deceiving or misleading appellant or those acting with him, nor is there any allegation that supplies the absence of a direct one to this effect. The demurrer to each plea in the replication was properly sustained.

Numerous errors are assigned on the rulings of the trial court, with respect to the admissibility of evidence, some of which are new and important. On the trial appellant offered in evidence the decisions of the Department of the Interior rendered in the matter of the protest against the former application of appellees for patent, on the Ophir lode, together with a notice, directed to them, that a hearing had been ordered upon such protest. Each of these was excluded. These decisions were rendered in the proceedings mentioned, in the plea of *res judicata*, to which reference has already been made. The principal contention between the parties was, upon which of the conflicting lode claims was a discovery of mineral first made? The department, in the protest proceedings, found from the evidence submitted that no discovery of mineral had been made upon the Ophir on the 11th day of October, 1893. Counsel for appellant contend that these decisions were material evidence, because this finding was conclusive upon that question, and that appellees were precluded from showing a discovery on the Ophir prior to that date. A sufficient answer to this proposition should be that, as the judgment

rendered in the protest proceedings was not *res judicata* between the parties to this action, no fact found by the department in those proceedings would be competent to contradict or establish any fact directly in issue in this. A consideration of the nature of an application for patent to mineral lands which is rejected, and the result of the judgment of the Department of the Interior, which merely holds that the applicant is not entitled to patent, and where the rights of others to the lands embraced in the application are not determined, will demonstrate that no finding of fact made by the department in such case is either conclusive or admissible in evidence in another action, in which the applicant bases no rights to the ground in controversy by virtue of such proceedings. Under the law regulating the issuance of patents to mineral lands and the rules of the department certain facts must be established. If not, the application is dismissed. Such a judgment is, in effect, one of nonsuit, and, therefore, not one upon the merits. R. R. Co. vs. Iles, 25 Colo. 19, 53 Pac. 222. It is no more than a conclusion than in that particular application the applicant has failed to establish the necessary facts to entitle him to a patent, the same as a judgment of nonsuit would be directed in an action at law, where the plaintiff had failed to establish the facts upon which he relied to entitle him to the judgment demanded. The fact that a protest had been filed does not change the rule when, as in this case, the rights of the protestants were neither involved nor adjudicated. Many authorities are cited by counsel for appellant in

which it has been held that the findings of fact made by the Department of the Interior are conclusive upon the courts. In all these cases the question involved was the authority of the courts to redetermine questions of fact already determined by the department, where parties either based their right upon a muniment of title issued by the government, which had been annulled, or were attempting to show that the facts upon which a patent had been issued were different from those necessarily established before the department, upon which it based its action. This is not the case at bar. Appellees are not asserting any right to the premises in dispute by virtue of the canceled receiver's receipt, by attempting to show that the findings of the department that no discovery of mineral had been made upon the Ophir at the time of their former application were not justified, but have instituted another proceeding to procure patent, which may be likened to a new action after having suffered judgment of nonsuit, and hence the authorities cited are not in point.

Our attention has not been directed to any case where the question here involved has been directly decided, but we think the rules of the Department of the Interior fully sustain our conclusion that the cancellation of a mineral entry only is not *res judicata* on another application for patent, and that the facts found, upon which such action is based, are not admissible to support an adverse claim against a second application for the same premises. In Branagan vs. Dulaney, 2 Land Dec. Dept. Int. 744, Secretary Teller, in speaking of the rights of the locator of a

mining claim, says: "The government gives the possessor of a lode his choice to hold it without patent, or to take patent. If he attempts to take a patent, and finds that he is met with obstacles not anticipated, he may relinquish his attempt to secure patent, and continue to hold by right of possession; thus, when the applicant to enter a lode claim is met with an adverse claim, he may, if he chooses so to do, avoid a legal conflict by dismissing his application for a patent, and rely on his title by possession given him by the local laws and customs, and a compliance therewith." In the case of the Clipper Mining Co., reported in 22 Land Dec. Dept. Int. 527, it appears that certain parties applied for a patent on a placer claim against which a protest was filed, upon the theory that the land embraced in the application was not placer. This protest was sustained, the department finding, as a matter of fact, that the ground was not subject to location as a placer mining claim. Afterwards lode claims were located within the limits of the placer, upon which applications for patent were made. The owners of the placer filed an adverse claim against the issuance of patent to the lode claims, in which they set up their old placer title; the applicants moved to dismiss because a judgment had already been rendered by the Land Department that the ground claimed as a placer could not be held as such; and the department refused to dismiss the adverse of the placer claimants, which was affirmed by the Secretary of the Interior. While the judgment of the latter seems to have been based largely upon the proposition that the adverse

claim ousted the department of jurisdiction, the secretary, in his opinion, said: "It is contended by counsel for applicant that the judgment in the Searl placer was a complete and final adjudication; that the land embraced therein was not placer ground, and could not be entered as such; hence, the adverse claim filed by Searl *et al.*, based, as it is, upon land for which application for patent has been rejected, ought not to be accepted by the department as a legal or proper adverse claim, and its application should be received and patent issued notwithstanding. * * * The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it." In the case of McGown vs. Mining Co., 23 Land Dec. Dept. Int. 113, the Secretary of the Interior, in speaking of the effect of the cancellation of a mineral entry, said: "The fact that the entry was canceled would not, of itself, render the ground subject to relocation. The original location of the lode was not affected by the cancellation, even though it had been regular, and the owner could still hold it under his possessory right so long as there was a compliance with the requirements of the law." The fair inference from these rulings is that the judgment of the department rejecting an application for patent, and nothing more, leaves the applicant with the same rights as though no application had ever been made.

The trial court excluded appellant's original certificate of location on the Tecumseh, which bore date May 3, 1892, was recorded May 6 of the same year, and claimed a discovery on April 18 preceding. The evidence was undisputed that no discovery of mineral in place, such as the law contemplates, was made upon the Tecumseh until April 20, 1894, at which time appellant relocated the premises and filed a certificate of location. His counsel contend that the original location certificate should have been admitted, because, a discovery having been made in the spring of 1894, it would relate back to the date of the original location. The validity of the location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits. Sec. 2320, Revised Stats. U. S. Until such discovery, no rights are acquired by location. The other requisites which must be observed in order to perfect and keep alive a valid location, are not imperative, except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of location. But not so with discovery, for it is upon that act that the very life of a mineral location depends; and from the time of such discovery only would the location be valid, provided, of course, that others had not previously acquired rights therein. North Noonday Min. Co. vs. Orient Min. Co. (C. C.) 6 Sawy. 299, 1 Fed. 522. Under this rule the original certificate of the Tecumseh was properly excluded; for the rights of appel-

lant to the disputed premises only dated from April 20, 1894.

Other errors assigned upon the admissibility of evidence are argued, but, as they are manifestly untenable, they will not be noticed in detail.

Errors are assigned upon the instructions given by the court, and also upon certain instructions requested by counsel for appellant and refused. Those relating to the instructions given will be first considered.

The correctness of the charge of the court defining "veins" is challenged. On this subject the jury was advised, in effect, that a vein is a continuous body of mineral-bearing rock, containing precious metals in appreciable quantities, with defined boundaries in the general mass of the mountain; that theoretically, it must have two walls, but that it was not absolutely necessary that they be disclosed; that their presence would be strong evidence of the existence of a vein, but that the boundaries of a vein might be ascertained by tests which would distinguish the rock or other substance carrying precious metals from the rock enclosing it, which did not. The criticism of the foregoing is that the definition of a vein, as therein given, was not applicable to the facts, and authorized the boundaries of a vein to be established by assays alone. On behalf of appellant it is claimed there were three well defined fissures of the Tecumseh disclosed in as many different shafts. It is conceded that on the Ophir a vein with defined boundaries was disclosed in the discovery shaft at a depth of about 34 feet. It was located prior to the Tecum-

seh. The important question upon which the rights of the parties hinged was, upon which claim was the first discovery made? In determining this fact, it was important to ascertain whether the vein of the Ophir was first disclosed near the bottom of the discovery shaft, or at a point about twenty feet from the surface. Witnesses for appellees had testified to the existence of the vein at this latter point, or to conditions which, if believed by the jury, from which its existence at this locality in the shaft might be inferred, although it appears that defined boundaries of the vein were not visible at this place. Many definitions of veins have been given, varying according to the facts under consideration. The term is not susceptible of an arbitrary definition, applicable to every case. It must be controlled, in a measure, at least, by the conditions of locality and deposit. Cheesman vs. Shreeve (C. C.), 40 Fed. 787. The distinguishing feature between a vein and the formation enclosing it may be visible. It must have boundaries, but it is not necessary that they be seen. Their existence may be determined by assay and analysis. *Id.*, Hyman vs. Wheeler (C. C.), 29 Fed. 347; Mining Co. vs. Cheesman, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712. The controlling characteristic of a vein is a continuous body of mineral bearing rock in place in the general mass of the surrounding formation, if it possesses these requisites, and carry mineral in appreciable quantities, it is a mineral bearing vein, within the meaning of the law, even though its boundaries may not have been ascertained. The instructions of the trial court recog-

nized the different conditions which should be considered in establishing the existence of a vein, applicable alike to the veins claimed to be disclosed upon the respective mining claims. On the property of appellant it was asserted that the walls of the vein were visible. On that of appellees, the vein was claimed to have been discovered about twenty feet from the surface, although at that point neither wall was disclosed. So that, taking into consideration the conditions which the respective parties asserted, and upon which they relied to establish the existence of a vein upon the respective properties, the charge of the court on this subject was correct.

Appellant contends that certain instructions requested upon his behalf, which were to the effect that the discovery shaft upon a mining claim must show a well-defined crevice, should have been given. This contention is based upon the proposition that the vein of the discovery shaft must be plainly visible. From what we have already said regarding the definition of veins, and how their existence may be determined, it is clear that the instructions requested, which sought to inject into the case the theory that a vein could not be said to be discovered unless its boundaries were disclosed, were properly refused.

The southwest corner post of the Tecumseh was not placed where it fell by right, because it was claimed that point was impracticable. The evidence establishes that this corner fell upon a railroad embankment. It is claimed by counsel for appellant that the court instructed the jury to the effect that unless it was found from the evidence that the true

southwest corner of the Tecumseh fell upon precipitous ground, and within the rails of the railroad occupying such embankment, or so near to one or the other of them that the erection of a post at that point would be interfered with by the passage of trains, it was the duty of appellant to set his post at the true corner. The instruction referred to is not happily worded, but it must be read as a whole, and also in connection with the one immediately following, from which it is apparent that the court directed the jury that appellant was required to place the southwest corner post of the Tecumseh lode at its true point, unless the evidence established that such point fell where it was impracticable to maintain it. Aside from these considerations, appellant is not in a position to complain of this instruction. It does not appear that the erection of a stake at the true corner would have been interfered with by the passage of trains. The most that can be said is that the true corner fell upon a railroad embankment twelve or fifteen feet in height. The statute provides that when one or more of the posts which must be erected for the purpose of marking the surface boundaries of a mining claim "fall by right upon precipitous ground, where the proper placing of it is impracticable, or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked, to designate the proper place." Section 3153, 2 Mills' Ann. St. These provisions concerning the placing of witness stakes cannot be invoked when the setting of a stake at the true corner is merely difficult or inconvenient.

Crœsus Mining, Milling & Smelting Co. vs. Colorado Land Mineral Co. (C. C.), 19 Fed. 78; Taylor vs. Parenteau, 23 Colo. 368; 48 Pac. 505. It certainly was not dangerous to life or limb to set this post at its true point upon a railroad embankment, and it does not appear that to have done so was impracticable; so that, if the instruction was susceptible of the construction claimed, it was correct, in that the post should have been erected at its true point, unless that point was in such proximity to the rails that it would be interfered with by the passage of trains. In this connection, we notice another point, although we do not wish to be understood as definitely deciding it. The statute above quoted provides that, where the conditions exist which authorize the placing of a boundary post at a place other than where by right it belongs, it shall be "suitably marked to designate the proper place." This requirement is for the purpose of designating where the true point or corner is, which is evidenced by such post, and that it shall be so marked as to impart this information. In this case it appears that the only marks upon the southwest corner post of the Tecumseh were "W. C. ——— 9005." These marks certainly did not indicate, by either course or distance, where the true southwest corner of the claim would be found.

At the conclusion of the introduction of the evidence, the jury was directed to visit the premises in dispute. Objection is made to the instruction of the court to the jury on this subject, in that it was to the effect that the object of this view was to enable

a better understanding and comprehension of the testimony of the witnesses respecting the issues involved, but that the verdict must be based upon the evidence introduced before the court. The contention of counsel for appellant is that the information gained by the jury in visiting the premises should have been treated by that body as substantive evidence. It is well settled by numerous decisions of this court that, although instructions need not be preserved by a bill of exceptions, yet, unless in an appropriate way an exception to an instruction is made in the court below, so that its attention is directed to the error of law complained of, this court will not review instructions which the trial court was given no opportunity to correct. Keith vs. Wells, 14 Colo. 321, 23 Pac. 99'; Edwards vs. Smith, 16 Colo. 529, 27 Pac. 809; Supreme Lodge vs. Davis, (Colo.) 58 Pac. 595; Railroad Co. vs. Ryan, 17 Colo. 98, 28 Pac. 79. At the conclusion of the instructions given by the court of its own motion, which embraced the one under consideration, an exception in this form was preserved: "To the giving of which instructions, and to each and every thereof, the plaintiff, by his counsel, then and there duly excepted." This is equivalent to saving an exception to each instruction separately, but it can not avail as against any instruction to which it is directed, which contains a correct statement of the law, because it is insufficient to point out that which is incorrect from that which is correct. Without attempting to state fully the instruction which contains the direction of which appellant complains, it

is sufficient to say that it embraces other distinct statements of law, which are manifestly correct. Therefore the exception noted was wholly insufficient to present the question for review which it is now sought to have us pass upon and determine. Other objections are urged to the instructions given, which, from the views expressed, we are of the opinion are not well taken, and we do not deem it necessary to notice them at length. Some of the instructions requested by appellants and refused, it is apparent from what we have already said, were not correct statements of the law; and as to the remainder, they were embodied in those given.

The remaining questions presented by counsel for appellant were raised upon a motion for a new trial, and may be considered under the following heads: Irregularity in summoning talesmen; misconduct of officers in summoning these talesmen; misconduct of guide selected by appellees; misconduct of jury; failure of jury to properly view premises in dispute; insufficiency of evidence to support verdict; newly-discovered evidence.

The District court of El Paso county is conducted under two divisions, in one of which civil causes are tried, and in the other criminal. It is the custom to assign certain jurors of the regular panel to each division. When this cause was called for trial, appellees demanded a jury of twelve. The number of jurors in attendance on the division in which the case was pending not being sufficient from which to select that number, the court, instead of calling jurors from the criminal division, directed a certain

number to be summoned by open venire. From the persons thus summoned, and those of the regular panel in attendance on the division in which this cause was tried, the jury was selected. After verdict of objection to the action of the court in summoning talesmen was made for the first time, when it was sought to show that the jurors in attendance on the criminal division were not employed or needed when the jury in this case was impanelled. Appellant is not in a position to raise any question regarding the action of the court in directing the issuance of an open venire. The exercise of reasonable diligence upon his part would have disclosed the apportionment of the jurors between the two divisions of the court, and if the conditions were such that he could have properly insisted on having jurors called from the division engaged in the trial of criminal causes who were not then actually upon any jury. Before talesmen could be placed in the box, it was his duty to call the attention of the court to this fact. Having failed to do so, any error in this respect is waived. It is not necessary, however, to place the decision of this question upon this ground alone. The apportionment of the regular panel between the two divisions of the court was entirely in the control of the judges. Their action in this respect cannot be interfered with. They make the apportionment in view of the expected need of jurors in the different divisions. If it turns out that they were mistaken in their action, it will not be inquired into for the purpose of ascertaining whether a proper apportionment was made or not. It was evident that a jury

of twelve could not be selected from the regular panel attending the division in which this cause was tried. The judge directed an open venire for a sufficient number for this purpose. This, in the exercise of his discretion as to how and when talesmen may be summoned, he had the clear right to do. § 2609, 3 Mills' Ann. Stat.; Sess. Laws 1891, p. 250, § 4.

It is claimed that the sheriff packed the jury in this case in the interest of appellees. This charge is based substantially upon these facts: It appears that the sheriff, or his office, received notice that a special venire for jurors would be issued. From what source this information was obtained is not disclosed. That persons, part of whom held commissions as deputies, were requested by the sheriff, or his official employés, to be at the sheriff's office on the morning of the venire issued, but prior to its issuance, who were afterwards summoned as talesmen and called into the jury box. One of these deputies, not selected as a juror, was afterwards detailed as the bailiff specially in charge of the jury in this case. There is not a word of evidence that the sheriff, or anyone connected with his office, or either of the persons summoned as talesmen, was biased against the appellant, or took any steps, directly or indirectly, to influence the jurors selected to try this cause. In our opinion, there is not the slightest reason to impugn the integrity of the sheriff, or those acting under him, in this matter.

While the jury was engaged in viewing the disputed premises, the guide selected by the appellees

pointed out to the jurors the place where, he claimed, the southwest corner stake of the Tecumseh would fall, by right. It seems that he had previously made a survey of the premises. This action on the part of the guide was wrong, and directly contrary to the instructions of the court; but the attention of the court was called to this matter previous to argument, whereupon the jury was directed to disregard what was said by the guide regarding the proper place for the stake, and told that upon this point nothing could be considered except the evidence introduced in the court room and upon the trial. This declaration of the trial judge was right, clear, and emphatic, and we cannot assume that men who had taken a solemn oath to obey the instructions of the court would disregard this plain, authoritative statement regarding their duty.

The misconduct of the jury is based upon the fact that one of the jurors, after the cause was submitted, was separated from his fellows. An affidavit of this juror and the bailiff fully explains the reason of one separation, but it is insisted that this is not the one established by affidavits filed in support of this ground of the motion for a new trial. According to one of these affidavits, the juror was in a room by himself, and during that period some unknown person was standing in the door of this room, who, upon seeing the affiant, turned and walked away. Much stress is laid upon the fact that during these separations the juror was seen alone in company with the bailiff, who had originally been summoned as a talesman. The mere separation of a jury after

the submission of a cause is not *per se* sufficient for setting aside the verdict and granting a new trial. It must appear that by reason of such separation there is a strong probability that the jury has been tampered with, or improperly influenced to return the verdict which is sought to be set aside. Dozenback vs. Raymer, 13 Colo. 451, 22 Pac. 787. There is nothing in the facts established by the affidavits to show that the jury or any member had been tampered with, or that any effort was made in this direction. Citizens who are required to render services in the determination of disputes between litigants should not be charged with a disregard of their duty or their oath, nor will the courts assume that they have been guilty of such conduct, unless the facts upon which such a charge is based warrant that conclusion. The facts upon which counsel for appellant rely in support of the claim that the jurors did not properly view the premises are to the effect that all of the jurors did not go down the Tecumseh discovery shaft, that one of the bailiffs stated to the jurors that those who did not care to go down the shafts of either the Ophir or Tecumseh need not do so; that two of the jurors did not view or examine either shaft, and that only one went down the shaft of the Ophir. In suits involving the title to the right of possession of a mining claim, it is made the duty of the court, upon the application of either party, to send the jury in a body to view and inspect the premises in dispute. Each party may select a guide, to be approved by the court, who shall be authorized to point out such features as it is desirable that the jury should see.

§ 188a, Mills' Ann. Code. In the case at bar the jurors were not directed to examine any particular portion or feature of either claim. According to the directions of the court on this subject, that was left to their discretion. We are not prepared to say that a litigant in a mining suit may not have the right to have the jury specially directed regarding the examination, but no such request was made by appellant in this case; and, therefore, while it may have been proper that the jurors should each have examined the shafts upon the respective properties, the appellant, having failed to request the court to so direct, is not in a position to complain because the jury, in the exercise of its discretion, only examined such features as, in its judgment, after having heard the testimony, were desirable for the purpose of aiding a better understanding and application of the evidence.

It is also urged that the evidence is insufficient to support the verdict, because as to some of the issues there was no evidence to sustain them, and as to others it was false and fabricated. We shall not attempt to give an abstract of the evidence upon which the jury determined the questions of fact involved in this case. It is sufficient to say that there is evidence tending to prove every material issue tendered by the appellees. Whether some or all of this evidence was false was a matter purely within the province of the jury. The witnesses were present in court. Their alleged inconsistent statements were a matter for the jury to consider in passing upon their credibility. In this condition of the record, we cannot disturb the findings of the jury.

The newly-discovered evidence upon which appellant bases his right to a new trial was evidence (so it is claimed) which would have impeached the credibility of one of the important witnesses of the appellees. It does not appear that if this witness had been impeached it would have changed the result. There were other witnesses testifying to the same matters that he did. Newly-discovered evidence which only goes to impeach the credit or character of a witness is not sufficient ground for a new trial, except it is clear that such impeachment would have resulted in a different verdict. Christ vs. People, 3 Colo. 394. The judgment of the District court is affirmed. Affirmed.

On Petition for Rehearing.

(November 19, 1900.)

Per Curiam. The conclusion announced, that the plea of *res judicata* interposed by appellant was insufficient, and that the judgment pronounced by the Land Department in the protest proceedings therein referred to was not competent evidence, in no manner conflicts with the decision in Insurance Co. vs. Hayden, 21 Colo. 127, 40 Pac. 453. In that case the right of the appellees to recover depended upon the fact that the insured was vested with the title in fee to the land upon which improvements destroyed by fire were situated. At the time the contract of insurance was entered into, the assured had obtained a receiver's receipt for these premises.

Subsequently, and prior to the loss, this receipt was canceled, and it was held that this action of the department was conclusive; that the character of title which the insured exacted should be vested in the insured did not exist. In the case at bar the appellees, when their entry was canceled, fell back upon the possessory rights initiated by the steps which they alleged had been taken in locating the premises in dispute. This they had a clear right to do, and therefore in establishing the fact regarding these steps they were not impeaching the judgment cancelling the receiver's receipt. Another important element necessary to constitute an estoppel *in pais* is that the party to whom the statement was made which it is sought to make the basis of an estoppel was ignorant of the truth of the facts to which such statement relates. Patterson vs. Hitchcock, *supra*. It does not appear from the plea interposed as an estoppel *in pais* that appellant was ignorant on the subject of the existence or nonexistence of a vein in the Ophir shaft. The plea in question contains no direct averment upon this point, or any from which the inference could be fairly and reasonably deduced that appellant had no knowledge as to what was or was not disclosed in the Ophir shaft, in the way of a vein. For this reason, it does not appear that he has been misled by the statements attributed to appellee Cone. For the same reason, it does not appear that the silence of Cone misled him to his injury.

For a better understanding of the reasons why the ruling of the trial court in excluding appellant's

original certificate of location on the Tecumseh was correct, the following facts should be borne in mind: The location of the Tecumseh under the discovery alleged to have been made April 20, 1894, was upon a discovery at an entirely different point from the discovery shaft upon which the original location was based. Under the new location a new discovery shaft was adopted. It became, in effect, an original location. The statute which permits amendatory or additional certificates to be filed provides that the filing of such a certificate shall not preclude the claimant under it from proving such title as he may have held under the original location certificate. § 3160, Mills' Ann. St. For this reason the original certificate may, under certain conditions, be admissible. Such conditions, however, do not exist in the case at bar. Prior to the discovery alleged to have been made upon which the second location is based, no right to the premises in dispute was vested in appellant which entitled him to hold the ground as against third parties, because no discovery of mineral had been made before that time. A location without a discovery carries with it no rights. Upton vs. Larkin, (Mont.) 6 Pac. 66. The acts to establish a location which appellant had performed prior to the discovery in April, 1894, would have taken effect, in so far as they could have been utilized, as of the date of such discovery. Erwin vs. Perego, 35 C. C. A. 482, 93 Fed. 608. Appellant, however, did not rely upon any of these acts, but filed a new location certificate, including ground the boundaries of which were different from that described in the

original certificate. This was a new location under a new and distinct discovery, and the act of filing a new certificate under this state of facts was a complete abandonment of all rights which might have attached to the steps taken under the original location. The appellees at all times relied upon a discovery claimed to have been made in the discovery shaft of the Ophir. Even if there was no mineral disclosed in this shaft at the time they filed their location certificate, the subsequent discovery which they claimed to have made in this shaft made this location valid, except as against intervening rights, from that date. Erwin vs. Perego, *supra*. They never filed any other certificate, and the original certificate of the Ophir was therefore properly admitted.

On the trial below, appellees offered in evidence samples of rock purporting to come from the discovery shaft of the Tecumseh, which they claimed did not contain mineral. In rebuttal, appellant produced a sample claimed to have been taken from a crevice in this shaft. This evidence was excluded on the ground that it was not rebuttal. "Rebutting evidence is defined to be that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side." 19 Am. & Eng. Enc. Law 1093. Appellant had offered evidence in chief tending to prove the existence of mineral in the discovery shaft of the Tecumseh. To meet this evidence, appellees had introduced samples from this shaft. As against this

evidence, the offer of appellant was not rebuttal. It was nothing more or less than evidence which would have tended to prove the existence of a vein in the Tecumseh shaft, and would properly have been admissible in chief, but was in no sense rebuttal; for it did not tend to explain, repel or disprove that the samples received in evidence on behalf of appellees were in fact mineral bearing, or did not come from the Tecumseh.

In instructing the jury on the subject of marking the surface boundaries of a lode claim, the court, in instruction No. 17, *inter alia*, stated: "Where, in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place." Immediately following this instruction, and upon this subject, the court further stated: "(18) Upon that point the court instructs you that unless you find from the evidence that the southwest corner of the Tecumseh claim fell upon precipitous ground, and within the lines of the rails of the Florence & Cripple Creek railroad, or so near to one or the other of them that the erection thereof would be interfered with by the passage of trains, and was for that reason impracticable, then you are instructed that it was the duty of the plaintiff to set his post at such corner. If, upon the other hand, you should believe that the proper place of such stake was within the lines of the rails of said road, then you are in-

structed that, under the statute, such witness corner shall be set at the nearest practicable point. Whether this was done, you are to determine from the evidence in the case; and unless you should believe, in that event, that the said witness corner was set substantially at the nearest practicable point, the marking of such claim would be invalid. (19) In this connection the court instructs you that if you believe from the evidence that the southwest corner of the Tecumseh lode fell by right on the roadbed of the Florence & Cripple Creek railroad, and that such point was precipitous ground, where the proper placing of such corner was impracticable, and that plaintiff placed such cornerstone at the nearest practicable point, suitably marked to designate the proper place, then such corner was sufficient and valid." It will be observed that these instructions follow each other, that 18 refers to that part of 17 above quoted, and that in 19 what is there stated on the subject is preceded by the statement "in this connection"; so that, while the instructions are numbered, they are so intimately connected, and refer one to the other, that the jury must have understood that they were to be read as a whole. When so read, the thought expressed by the trial court is to the effect that appellant was not excused from placing the southwest corner post of the Tecumseh lode at its true point unless it appeared from the evidence that such point fell where it was impracticable to maintain it.

Counsel for appellant contend that, under instructions given and refused, the jury was precluded from considering the admitted fact that veins were

exposed in two different shafts upon the Tecumseh, designated as 2 and 3. What we said in the original main opinion on this subject is withdrawn. In considering this question, these facts must be borne in mind: Whether or not a mineral-bearing vein was disclosed in the discovery shaft upon which the present location of the Tecumseh is based was controverted. No location was made upon either of the discoveries in shafts 2 and 3. The proposition of counsel for appellant is that if a well-defined crevice, although not bearing mineral in appreciable quantities, is exposed in the discovery shaft, the claimant may rely upon discoveries in other shafts within the boundaries of his claim which disclose the mineral necessary to constitute technical veins. No question is raised regarding the validity of our statute relative to the location of mining claims. In order that there may be no mistake as to the position of counsel on this subject, we quote from their original brief, as follows: " * * * If the discovery shaft contains a well-defined crevice, thus giving all the appearance of a discovery, the claimant may rely upon other shafts within the boundaries of the claim for his discovery of the mineral necessary to constitute technical veins. The State statute does not provide what the well-defined crevice shall contain, while the act of Congress makes no provision as to what shaft the vein required shall be in. Reading and applying the two statutes together, we submit that the well-defined crevice must be in the discovery shaft, and the mineral-bearing vein may be found in some other shaft upon the claim," and also from their reply

brief, in support of their petition for a rehearing, the following: "We come now to the question as to whether the entire right to a claim, in so far as the same depends upon a discovery of a well-defined crevice, as required by the State statute, and the discovery of a vein, as required by the act of Congress, is wholly dependent upon the discovery shaft. * * * We have not questioned the validity of our State statute. It is not necessarily, when properly construed, in conflict with the act of Congress. Both the State statute and the act of Congress can be given effect, and they should be so construed as to accomplish this. * * * We have not maintained that a discovery shaft can be altogether dispensed with. Neither have we maintained that, when the State statute in regard to such crevice has not been literally complied with, we can go outside of the discovery shaft for the technical lode or vein, the discovery of which, within the limits of the claim, is required by the act of Congress." The statute of this State which designates what shall be disclosed in the discovery shaft provides that it shall disclose a well-defined crevice at the depth of at least ten feet from the lowest part of the rim of such shaft, at the surface. § 3152, 2 Mills' Ann. St. It being conceded that the laws of this State relative to the requirements of a discovery shaft are valid, it appears to us that the proposition upon which counsel rely is not tenable. If, as stated, the State statute is legal, it necessarily follows that the discovery shaft must expose the vein upon which the location is based, or at least disclose one, and therefore the mere discovery

of some other vein within the limits of the claim cannot supply the absence of the one required to be exposed in the discovery shaft. In other words, the proposition of counsel for appellant cannot be upheld unless the State statute is declared invalid, and the admission upon their part that it is not relieves us from the necessity of determining the effect of discoveries in shafts 2 and 3 of the Tecumseh. "Crevice," as employed in the statute relative to a discovery shaft, clearly means a mineral-bearing vein. It was so held by this court in Bryan vs. McCaig, 10 Colo. 309, 15 Pac. 413. The Circuit Court of the United States for the District of Colorado has adopted the same view. Van Zandt vs. Mining Co. (C. C.), 8 Fed. 725; Terrible Min. Co. vs. Argentine Min. Co. (C. C.), 89 Fed. 583; Cheesman vs. Shreeve (C. C.), 40 Fed. 787. Under these decisions, coupled with the admitted legality of the State statute, the fact that discoveries were made in shafts 2 and 3 upon which no locations were made does not in any manner affect the validity of the Tecumseh.

It is asserted that the evidence is insufficient to establish the fact that the assessment for the year 1897 was performed on the Ophir. A witness on the part of appellees testified that he had extended a drift on the Ophir on account of the assessment work for 1897 a distance of seven or eight feet; that this drift was worth $12 a foot. For this labor appellees appear to have paid the sum of $90. For additional work they paid for two days' work at the rate of $4 per day, and later, for further work $18. This, in addition to paying for the powder, fuse, steel and candles

that were used in working the assessment. There may have been some evidence to the effect that the work was not worth the amount paid, but this was a question for the jury to determine; and as it has been determined in favor of appellees, upon evidence sufficient to sustain it, the finding on this subject will not be disturbed.

On the subject of annual labor, the court, by Instruction No. 24, directed the jury as follows: "Upon this point the court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and, the plaintiff claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon is on the plaintiff; and unless he has shown you by a fair preponderance of the evidence that the work was not done, you are to determine that question in favor of the defendants." The objection urged to this instruction is that it cast a burden upon the appellant which he was not required to assume. The evidence tended to establish that a valid location of the premises in dispute had been made by appellees. This location was prior to the only one under which appellant can base any claim. The act of Congress (§ 2324, Rev. St.) provides that a failure to perform the necessary annual work shall render a claim open to relocation, provided the original locators have not resumed work upon the claim after failure and before relocation. The fair construction of this provision is that, as between the locator and the general government, the failure to do the annual assessment work does not

result in a forfeiture. In other words, it is not necessary to perform the annual labor, except to protect the rights of the locator against parties seeking to initiate title to the same premises. As against such subsequent location, a *prima facie* case is made on the part of the original locator by showing a valid location. Hammer vs. Milling Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964. To otherwise express our views, it might be said that after a valid location the title thus acquired remains so, whether the annual assessment work is performed or not, until forfeited or abandoned. Renshaw vs. Switzer, 6 Mont. 464, 13 Pac. 127, 15 Morr. Min. R. 345. It is the location by the new claimant and not the mere lapse of time which determines the right of the original locator. Little Gunnel Gold Min. Co. vs. Kimber, 1 Morr. Min. R. 536. So that a party seeking to initiate a claim to mining premises already legally located must prove that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location. In so far, then, as the rights of appellant depended upon the failure of appellees to perform the assessment work for 1897, it was incumbent upon him to establish this fact by a fair preponderance of the evidence, or, as the court stated, the burden of proof was upon him to show that the work for 1897 was not in fact performed. Hall vs. Kearney, 18 Colo. 505, 33 Pac. 373, Johnson vs. Young, 18 Colo. 625, 34 Pac. 173; Hammer vs. Milling Co., *supra*. The petition for rehearing is denied. Petition denied.

62 Pac. 948.

No. 300. 84

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IN

Filed Oct. 21, 1901.

The Supreme Court

OF THE

UNITED STATES

JOSEPH H. BEALS,
Plaintiff in Error,

v.

JAMES J. CONE AND LYMAN ROBISON,
Defendants in Error.

300.

PETITION FOR WRIT OF ERROR; ASSIGNMENT OF ERRORS, AND BRIEF IN SUPPORT OF PETITION.

H. B. JOHNSON,
Attorney for Plaintiff in Error.

THE S. J. LUBRITZ PRESS, 1535-41 LAWRENCE ST., DENVER, COLO.

IN

The Supreme Court

OF THE

UNITED STATES.

JOSEPH H. BEALS,
Plaintiff in Error,

v.

JAMES J. CONE AND LYMAN ROBISON,
Defendants in Error.

PETITION FOR WRIT OF ERROR.

And now comes the above named plaintiff in error and says that there is manifest error in the record and proceedings herein, of which this Court has jurisdiction, as shown by an assignment of errors filed herein; a duly certified copy of the entire record, and a brief herewith presented, and prays that a writ of error be allowed, commanding the said Supreme Court of the State of Colorado to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States; and the said plaintiff in error further prays that an order be entered that said writ of error shall operate as a *supersedeas.*

H. B. JOHNSON,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

JOSEPH H. BEALS,
Plaintiff in Error,
v.
JAMES J. CONE AND LYMAN ROBISON,
Defendants in Error.

ASSIGNMENT OF ERRORS

And now comes the above named plaintiff in error and says that there is manifest error in the records, proceedings and judgment aforesaid, to wit:

1. The Supreme Court of the State of Colorado erred in affirming the ruling, order and judgment of the Court below sustaining the demurrer of the defendants below to the second paragraph of plaintiff's replication to defendant's answer, and counter claim, which said paragraph was as follows:

"And for further replication plaintiff alleges that defendant on February 10, 1893, made a mineral entry which included said Ophir lode; that subsequently this plaintiff, with others, filed a protest against that portion of the entry which related to said Ophir lode; that said protest alleged, among other things, that there had been no discovery of any vein, lode, ledge or deposit of mineral on said Ophir lode; that the Commissioner of the General Land Office directed the Register and Receiver of the local land office at Pueblo, Colorado, to order a hearing of said protest, which was done, and which hearing took place on October 11, 1893; that at such hearing defendants appeared in person and by counsel, and defendant Cone testified thereon; that the testimony taken at

such hearing was reduced to writing as given, and immediately subscribed by the witnesses; that upon appeal to the Commissioner of the General Land Office, such Commissioner found and adjudicated that there had been no discovery on October 11, 1893, on said Ophir lode, and on appeal to the Secretary of the Interior such Secretary found and adjudicated, on December 28, 1895, and again on March 11, 1896, that no discovery had been made; that, in pursuance of such findings and adjudications, the said mineral entry was cancelled as to said Ophir lode; that it was further found and adjudicated by said Commissioner and Secretary that the discovery shaft on said Ophir lode was, on October 11, 1893, only twenty-five feet deep, and that the sinking of this shaft was the only work that defendants had ever performed on said lode prior to that time" (Record, folios 26–28).

2. The said Supreme Court erred in sustaining the ruling, order and judgment of the Court below, sustaining the demurrer of defendant's to the third paragraph of plaintiff's replication to defendant's answer, and counter-claim, which said paragraph is as follows:

"And plaintiff, for further replication, alleges that on said hearing on October 11, 1893, the defendants appeared by their duly authorized attorney, and defendant J. J. Cone appeared in person; that on said hearing said Cone testified that shortly prior to giving his testimony he measured defendant's discovery shaft on said Ophir claim with a tape line and that it was twenty-five feet deep, that no vein was discovered on or in the Ophir, and that no work had been done on said lode in the year 1893; that said testimony induced plaintiff, and others interested under him, to expend a large sum of money in exploring for mineral in the ground in conflict between the said Ophir and Tecumseh lodes; that defendants knew at all times that plaintiff and others under him, were making such expenditures on the faith of the truth of said

testimony, and never contradicted the same; that if, on October 11, 1893, the defendants had done any work in 1893, or had ever sunk their discovery shaft to a greater depth than twenty-five feet, or had ever discovered a vein in such shaft on or in said Ophir lode, this plaintiff, and those acting under him, in the working and developing of said Tecumseh lode, were entirely ignorant of the fact; that plaintiff and those acting under him have expended in the development of said Tecumseh lode between ten and fifteen thousand dollars on the faith of the truth of said testimony, which defendants are now attempting, by denying the truth thereof, to take the entire benefit of; that to permit defendants to now dispute the truth of said testimony would work a fraud upon plaintiff and others acting under him in the expenditure of money as aforesaid in the working and developing of said Tecumseh mine" (Record, folios 29–31).

3. The said Supreme Court erred in sustaining the ruling, order and judgment of the Court below excluding the decisions of the Secretary of the Interior, when offered in evidence by plaintiff, under which said decisions the entry of defendants of the Ophir lode was canceled, and in excluding exhibit M, relating to such cancellation (Record, folios 721–745).

4. That the said Supreme Court erred in sustaining the ruling, order and judgment of the Court below excluding exhibit A, being the original certificate of location of the Tecumseh lode, when the same was offered in evidence by plaintiff (Record, folios 121–127).

5. The said Supreme Court erred in sustaining the ruling of the Court below in giving instructions numbered three, four, five and six and sixteen, which said instructions are as follows:

"3. What is meant by a vein or lode under the statute is a body of mineral or mineral-bearing rock, with defined boundaries, in the general mass of the mountain. This vein, lode or body of mineralized rock must contain an appreciable quantity of some of the precious metals, such as gold and silver. While the vein must be found in rock in place—that is, separated by well-defined boundaries from the general mass of the mountain, it is not necessary that it should have these characteristics at the surface, or that it should be, theoretically, perfect in all respects as to all these characteristics. If the vein, in continuing down, passes or is included within walls of rock in place, it is a sufficient discovery, if it is sufficient in other particulars, that is, containing mineralized rock, bearing appreciable quantity of precious metal. Theoretically, a vein must have two walls which clearly separate it from the general mass of the mountain, but, for the purposes of this case, you are instructed that if there is a body of mineralized rock, containing appreciable quantities of some of the metals, and if it is found in place, it is not necessary that it should have two well-defined walls; it is, for practical purposes, a vein, if the mineralized body of rock, or the body of mineral, is found in the general mass of the mountain, and if it continues unbroken and without interruption, it is regarded as a vein, whatever the boundaries may be; and if it contains such a showing of mineral in connection therewith as that a competent miner would be willing to follow it in prospecting, in the expectation of reaching thereby richer or larger quantities of ore beyond. Such a vein may be very thin or wide, or it may be rich or nearly barren. It is neither the width of the crevice, nor the richness of its contents that alone determine whether that which is discovered is a vein or a lode within the meaning of the statutes. A mineral vein or lode, whether small or large, rich or poor, at the point of discovery, if discovered and located in compliance with the acts of Congress and the statutes of the State, creates the title and the right of possession, as set forth in these instructions.

"4. The vein or lode which the law requires to be discovered, need not contain, as disclosed in the discovery shaft, ore or mineral, in the sense that it will pay for extraction or shipment, but the vein or lode must appear as a distinctive formation in the country rock, and appear therein in the nature of mineral or mineral-bearing rock, different in character and nature from the country rock inclosing it. And in this connection, in this definition, the elements are the body of mineral, or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode or vein, whatever the boundaries may be. On the other hand, with well-defined boundaries, very slight evidence of such mineral would be sufficient to establish the existence of a lode. Such boundaries constitute a fissure, and if in such fissure mineral is found, although in small quantities, it may be called a lode or vein.

"5. In this connection the Court instructs you that it is not necessary to the existence of a thing as a vein, that the mineral-bearing rock, or the rock which carries the mineral, should be quartz; it may be any other kind of rock carrying mineral, even though the rock itself was originally of the same character, or composition, as the surrounding walls, and though it may be subsequently changed or decomposed, by natural agencies from its original character, provided that one may detect in the ground and mark the boundaries between such mineral-bearing rock and its enclosing walls, or by assays establish the difference between the walls and the mineral-bearing rock.

"6. The Court instructs you that the statute requires that the vein or lode must be in place. This term indicates the body of the country, which has not been affected by the action of the elements, and which remains in its original state and condidition, as distinguished from the superficial mass which may lie above it. A continuous body of

mineral, or mineral-bearing rock, extending through loose, disjointed rocks, is a lode as fully as that which is found in the more regular formation; and if the lode is in the general mass of the mountain, as distinguished from slide, debris or tumble stuff on the surface, it is in place within the meaning of the Act of Congress. If the principal part of the rock about the mineral is in its original position, according to the present structure of the mountain, the lode is in place, although some masses of the rock or boulders may be associated with the ore.

"16. The term, 'well-defined crevice,' as used in the statute, is intended to mean a vein, or lode or ledge of mineral-bearing rock between walls. In its practical application, however, it must be considered in connection with the character of the mineral deposit which is the subject of location. If the lode is very wide, or is horizontal, or exists with boundaries ascertainable by assays or analysis, then a discovery shaft sunk into or upon or through the same at a distance of ten feet or more below the surface, is in effect the exposure of such a well-defined crevice as the law requires, for, were it otherwise, many metalliferous lodes or deposits could not be located or appropriated at all." (Record, folios 1823-1830 and 1840).

These instructions (all bearing on the same subject) were each and every one of them erroneous, for the reasons:

First—They are abstract in form. They were intended to apply to both the Tecumseh and the Ophir discovery shafts. There was no similarity between these shafts.

The Tecumseh shaft contained a well-defined crevice, and the only point of dispute was as to whether such crevice contained such mineral-bearing rock as would make it a vein. The Ophir shaft, at the depth of twenty-five feet, contained no crevice, and the only claim made for it was that

the rock had been impregnated with mineral from a crevice that was reached at a depth of thirty-four feet.

Second—They authorized the jury to find that a vein was discovered in the Ophir shaft, at a depth of twenty-five feet, on evidence, for which the highest claim that was or could be made was, that it tended to show that the country rock above the hanging wall of the vein subsequently discovered, had been impregnated with mineral from such vein.

Third—Instruction three authorized the jury to find that a vein had been discovered in the Ophir shaft, at a depth of twenty-five feet, notwithstanding no well-defined crevice had been reached; neither wall of a vein had been reached, and no point had been reached which subsequent development showed was within any boundaries or walls of a vein. All that was required was that, irrespective of walls, boundaries or formation, there should be "such a showing of mineral in connection therewith as that a competent miner would be willing to follow it in prospecting, in the expectation of reaching thereby, richer or larger quantities of ore beyond."

Fourth—The fourth and fifth instructions, as applied to the Ophir lode, practically advised the jury that any mineral-bearing rock that would assay would, irrespective of any fissure or its boundaries, constitute a vein.

Fifth—The sixth instruction authorized a body of mineral-bearing rock (as formerly defined) extending through loose, disjointed rocks, to be pronounced a vein.

Sixth—The sixteenth instruction entirely dispenses with any necessity of discovering a well-defined crevice (as required by the State statute) or a vein (as required by the Act of Congress).

Seventh—Said instructions are not, as applicable to the Ophir shaft, based upon any evidence in the cause.

Eighth—None of said instructions properly define a vein within the meaning of the Act of Congress requiring the discovery of a vein within the limits of the claim.

6. The said Supreme Court erred in sustaining the Court below in giving instruction number eighteen, which said instruction is as follows:

"18. Upon that point the Court instructs you that unless you find from the evidence that the southwest corner of the Tecumseh claim fell upon precipitous ground, and within the lines of the rails of The Florence & Cripple Creek Railroad, or so near to one or the other of them that the erection thereof would be interfered with by the passage of trains, and was for that reason impracticable, then you are instructed that it was the duty of the plaintiff to set his post at such corner. If, on the other hand, you should believe from the evidence, that the proper placing of such stake was within the lines of the rails of said road, then you are instructed that under the statute such witness corner shall be set at the nearest practicable point. Whether this was done, you are to determine from the evidence in the case, and unless you should believe in that event that the said witness corner was set substantially at the nearest practicable point, the marking of said claim would be invalid" (Record, folio 1843).

7. The said Supreme Court erred in sustaining the ruling of the Court below in refusing instructions numbered one and ten, and in giving instruc-

tion numbered twenty-one, which said instructions are as follows:

"1. No location of a mining claim is valid unless the locator has sunk a discovery shaft deep enough to show a well-defined crevice, and, in addition thereto, has discovered the vein or lode within the limits of the claim; and, if the jury believe from the evidence that the Ophir claim was located in 1892; that during that year the discovery shaft was sunk to a depth from twenty-five to twenty-eight feet; that no well-defined crevice was shown therein or that no vein or lode was discovered therein; that plaintiff perfected a valid location in 1894 by sinking a discovery shaft on the Tecumseh to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and found a well-defined crevice therein, and discovered a vein or lode of mineral within the limits of the said Tecumseh claim; that he posted at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator and the date of discovery, and marked the surface boundaries with six substantial posts, either of wood or stone, sunk in the ground, to wit: one at each corner and one at the center of each side line, marked on the side or sides which were in towards the claim; that plaintiff executed and filed the location certificate introduced in evidence; that plaintiff or any one claiming under him has done $100.00 of labor or improvements on said Tecumseh claim for each year since 1894, they will find the plaintiff is entitled to possession of the ground in conflict by virtue of a compliance with the statutes of the United States and the State of Colorado."

"10. If the jury believe from the evidence that plaintiff has disclosed in his discovery shaft a well-defined crevice, containing mineral in appreciable quantities, by which is meant quantities which can be weighed and assayed and running from $1.00 to $3.00 or $4.00 per ton, and that such mineral is found in occasional spots in such crevices; and that this discovery was made prior to any similar dis-

covery on the Ophir claim, and the plaintiff has complied with the laws of the State and the United States, as defined in these instructions, then your verdict will be for the plaintiff."

"21. You are further instructed that while the statutes do not require that the discoverer of mineral or of a vein should sink his discovery shaft at the point of discovery, but may sink the same at any point within the exterior boundaries of the claim he may desire, nevertheless you are instructed that it must be sunk upon a vein within said boundaries, and that the right and extent of the lode mining location must be measured by and from such discovery shaft and its position within the lines of said location" (Record, fols. 1790, 1804, 1846).

8. That the said Supreme Court erred in sustaining the Court below in giving instruction numbered twenty-four, which said instruction is as follows:

"24. Upon this point the Court further instructs you that the law does not presume a forfeiture by the failure to perform annual labor, and the plaintiff, claiming that the Ophir lode became forfeited for such reason, the burden of proving that the annual labor was not done thereon is on the plaintiff; and unless he has shown you, by a fair preponderance of the evidence, that the work was not done, you are to determine that question in favor of the defendants" (Record, folio 1849).

9. That the said Supreme Court erred in holding that the record contains any competent testimony to show that defendants in error performed annual labor or made improvements on the Ophir claim of the reasonable value of $100 for the year 1897.

10. That the said Supreme Court erred in sustaining the ruling of the Court below refusing instructions six and thirteen asked by plaintiff below, which said instructions are as follows:

"6. Where the vein in controversy is a true fissure vein, it cannot be said to be discovered until the shaft shows the existence of a fissure. A vein or lode authorized to be located is a crevice or fissure in the earth's crust containing rock in place carrying gold, silver or other valuable mineral deposits named in the statutes, and a crevice is an opening or fissure in the earth's crust; and before such crevice can be considered well defined, the opening or fissure must be so disclosed as that its existence can be established by proof at the time when the discovery is claimed.

"13. The jury are instructed that the distinguishing characteristics of a fissure vein are the openings in the earth's crust in which mineral may be deposited, and the deposit of mineral itself. Where one of these features is clearly established, the other may be established by a less conclusive amount of proof. Where one wall of a vein is disclosed, and a body of mineral is found adjoining it, it may be presumed that there is somewhere another boundary or wall. But where no crevice and neither boundary of a crevice has been disclosed, the mere finding of country rock, that in one instance furnishes an assay, cannot be received as sufficient proof of the existence and discovery of a fissure vein" (Record, folios 1792 and 1805).

11. That the said Supreme Court erred in sustaining the instructions of the Court below in regard to the view of the premises in controversy by the jury, and in its construction of said instruction which dispensed with such view by the entire jury in a body, which said instruction is as follows:

"In reference to your visit to the premises in controversy, the Court instructs you that you are to go to the said premises accompanied by and under the charge of the bailiff appointed by the Court for such purpose.

"Each party to the suit, under the statute, has the privilege of nominating one person, to be

approved by the Court, to attend with the jury in your view and investigation of said premises.

"Such persons so selected and appointed by the Court, who in this case are J. W. Carr, for the plaintiff, and James F. Smith for the defendant, shall be authorized to act as guides to the jury, and to point out to you such features in the premises as it is desirable that you should see, and answer all questions touching the same proponded by you. Such guides, however, must not argue or discuss any questions involved in this case, either with the jury or with each other in the presence of the jury, nor should you engage in any discussion with them, or either of them, nor should you permit any such discussion by them, nor should you talk with any other person, or allow any other person to talk with you about the case. These guides should be with you only while you are engaged in your view and investigation of the premises, and at no other time or place.

"The Court further instructs you that the object of your visit to, and examination of, the premises in controversy therein, is to enable you to see for yourselves, and to examine for yourselves, the physical situation, condition and surroundings of the premises; hence, whatever you learn by such view and examination, is available to enable you to determine the weight of the conflicting testimony of the witnesses respecting the matter upon which they have testified, and to enable you thereby the better to understand and to comprehend the testimony of the witnesses respecting the issues involved herein concerning said premises, and your verdict must be based upon the evidence before the court, thus the more intelligently applied by you from your view and examination of said premises. And you must not deliberate among yourselves, or discuss the case in any respect, or in any of its phases, until after you have returned from your view into open court, and sent by the Court to your jury room to consider your verdict.

"The Court wishes to impress upon the jury the necessity of strict observance and compliance by

the jury, and also by the guides, in regard to the foregoing instructions, and in case of any attempt upon the part of the guides, or either of them, to violate their duty, as explained to you in these instructions, the jury, or any member thereof, must at once interpose and put a stop thereto and report to the Court any infraction or violation by the guides of their simple duty, as outlined to you in these instructions" (Record, fols. 1784-1788).

12. That said Supreme Court erred in holding that the view of the premises need not be had by the entire jury acting as a body, and that such view need be participated in by such jurors only as those who, in their discretion, saw fit so to do.

13. The said Supreme Court erred in holding that the venire was properly ordered by the Court below; in sustaining the Court below in not granting a new trial because of irregularity in ordering said special venire and in not reversing the judgment because of such irregularity.

14. The said Supreme Court erred in holding that said special venire was not made use of by the sheriff to pack a jury in said cause, and in not reversing said judgment by reason of this fact.

15. The said Supreme Court erred in holding that the conduct of one of the guides in making a survey and pointing out to the jury while viewing the premises the place where, as he claimed, the southwest corner post of the Tecumseh claim would fall by right, was not a ground for a new trial.

16. The said Supreme Court erred in holding that the various separations of the jury while hearing the case, and after the submission of the same, as shown by the evidence, did not constitute a ground for a new trial.

17. The said Supreme Court erred in holding that the newly discovered testimony impeaching the credibility of the witness Smith did not furnish a ground for a new trial.

18. The said Supreme Court erred in holding that certain samples of rock offered in evidence, on rebuttal, and the testimony in relation thereto, were not rebutting evidence, and were properly excluded on this ground.

19. The said Supreme Court erred in holding that discoveries in shafts other than the discovery shaft cannot be taken into consideration for any purpose on the trial of an adverse suit.

20. The said Supreme Court erred in holding that there was evidence to support the verdict, in view of the facts:

First—That there was no evidence that a vein, within the meaning of the Act of Congress, was discovered in the Ophir shaft prior to the discovery of such vein in the Tecumseh shafts.

Second—That there was no legal and competent evidence that labor and improvements of the value of $100, were made and performed on said Ophir claim for the year 1897.

21. That the said Supreme Court erred in holding that after a valid location has once been made, a locator need not perform any labor, or make any improevments, annually, in order to maintain his title, as against the United States, or as against any one else who has not re-located the claim by reason of a forfeiture, and be entitled, in the adverse suit, to such a verdict and judgment as were rendered and entered in this cause.

22. That the said Supreme Court erred in holding that the willful use of false testimony, and the manufacture of fictitious evidence by what is known as the "salting" of the Ophir shaft, was not a ground of reversal of the judgment in said cause.

23. That the said Suprene Court erred in not reversing the judgment herein, instead of affirming the same.

Wherefore, the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment of said Supreme Court of the State of Colorado.

H. B. JOHNSON,

Attorney for Plaintiff in Error.

We shall only present such of the errors assigned as relate to Federal questions over which this Court has jurisdiction to review the decision of the highest court of a state.

It may be conceded that the mere fact that an adverse suit is provided for by Act of Congress does not operate to give the Supreme Court of the United States jurisdiction to review any judgment of the highest court of a state in such a cause. (Blackburn v. Portland Gold Mining Co., 175 U. S., 571; Shoshone Mining Co. v. Rutter, 177 U. S., 505.) In the Rutter case the Court said:

> **"So, we conclude, as we did in the prior case, that, although these suits may sometimes so present questions arising under the Constitution or laws of the United States that the Federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the Statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts."**

It may be true that many actions for possession, based upon adverse claims, may be tried without any Federal question arising; but, it is obvious that, in such a cause, such question is more likely to arise than in other causes. A compliance with the laws of the State and of the United States is the foundation of the right and title to a mining claim. In all cases where there is any dispute as to whether certain acts constitute such compliance with the laws of the United States, it is necessary, in order to determine the question in controversy, to construe such laws of the United States and determine their meaning and intent.

The clause of the statute under which this case clearly falls, reads:

"Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority." (Rev. Stat. U. S., §§ 709, 1017.)

For the purpose of jurisdiction, it is certain that it matters not whether the Federal question is decided erroneously or not. If the question is in the record, and was passed upon, or should have been passed upon, then a writ of error will lie; and the question as to the correctness of the rulings of the State Court will only be determined upon final hearing.

There are several questions which give this Court jurisdiction.

1. We claimed the right to have the findings and decisions of the Secretary of the Interior treated as final and conclusive on the question as to whether there was a valid discovery in the Ophir shaft on October 11, 1893, at a depth of twenty-five feet, which right was denied by the Court. This is a question that arises under the statutes of the United States.

2. We claimed the right to introduce the decisions of the Secretary of the Interior in evidence, at least for the purpose of showing that at the time of our discovery and location of the Tecumseh, the same were made upon the unoccupied public domain of the United States, which right was denied. The right claimed was based upon the statutes of the United States, and the denial thereof gives rise to a Federal question.

3. Annual labor of the value of $100 is required by Act of Congress. Another Act of Con-

gress contemplates that a jury may find *against both parties*. We claimed the right to have this judgment reversed, by virtue of these Acts of Congress, on the grounds: (1) That there was no legal evidence showing that work was done of the value of $100 for the year 1897. (2) That the Court below erroneously instructed the jury to the effect that the law *presumes that such work was done*. The Court has denied us this right, and, upon such ruling a Federal question is presented.

4. We claimed the right to maintain our title to the Tecumseh claim by discoveries outside of the discovery shaft, and that such discoveries should be taken into consideration, in connection with the discovery shaft, to determine whether we had discovered a well-defined crevice in the discovery shaft, as required by the State statute, and a vein, within the limits of the claim, as required by the Act of Congress. This right was denied, and thereby another Federal question is presented.

5. We claimed that, on the undisputed facts of the case, the defendants had made no discovery of a vein, within the meaning of the Act of Congress, at the time of our discovery, and that the Court committed error in its instructions as to what constitutes a vein; and this is a Federal question.

6. We claimed the right to have the testimony of James J. Cone, one of the defendants, given in a United States Land Office, to the effect that, on October 11, 1893, no vein had been discovered in the Ophir claim, operate as an estoppel *in pais*, under the circumstances set forth in a plea. The denial of this right may raise a Federal question.

Let us examine these questions briefly.

I.

Res Adjudicata.

The defendants below, in their answer, alleged title to the Ophir lode by reason of having made a valid location on February 3, 1892. No work was done upon this lode from 1892 until 1895. One of the vital questions in the case was whether a shaft on this lode, about twenty-five feet in depth, contained a valid discovery, in 1892. If not, then no discovery was made upon the Ophir until 1895.

The plaintiff, in a replication which appears in the assignment of errors, alleged that defendants on February 10, 1893, made a mineral entry including the Ophir lode; that plaintiff, with others, filed a protest on the ground that no discovery had been made; that a hearing was ordered and had on October 11, 1893; that upon appeal the Commissioner of the General Land Office found and adjudicated that there had been no discovery; that, on appeal to the Secretary of the Interior, he twice found and adjudicated that no discovery had been made; that these officers found and adjudicated that the Ophir shaft was, on October 11, 1893, only twenty-five feet deep, and that, in pursuance of these adjudications, said mineral entry was canceled. A demurrer was sustained to this replication.

A discovery was made in the Ophir shaft, in 1895, at a depth of thirty-four feet, but a valid discovery had been made on the Tecumseh lode, in three different shafts, more than a year before the discovery in the Ophir in 1895. Hence, it was necessary to go back to 1892, when the last work had

been done prior to 1895, and attempt to show that a discovery had been made prior to October 11, 1893. This could only be done by disregarding the decisions of the Commissioner and the Secretary.

The Court below maintains that, as this is a second application for a patent, nothing that was adjudicated as to their first application has any materality to the case. This might be true if they were relying only on a discovery made after October 11, 1893. Then their new application would make a new case. We do not rely on these adjudications as showing that they had not a discovery at the time of their new application. We simply plead these adjudications as *res adjudicata* of their claim that they had a discovery earlier than October 11, 1893. To attempt to show a discovery of an earlier date is to disregard and overthrow these adjudications. Can this be done?

The technical rules in regard to judgments do not apply to these decisions. Land officers' decisions are only of a *quasi* judicial character (United States v. Minor, 114 U. S., 233). It has been decided that where these officers grant a patent it will be assumed that they found that a discovery had been made, and that such finding is binding upon the courts (Justice Min. Co. v. Lee, 21 Colo., 260). The same rule applies where an application for a patent is rejected because of a failure to comply with the law (Moore v. Robbins, 96 U. S., 530; Vance v. Burbank, 101 U. S., 514; Baldwin v. Stark, 107 U. S., 463; Lee v. Johnson, 116 U. S., 48; Sanford v. Sanford, 139 U. S., 642; Calhoun v. Violet, 173 U. S., 60; Acers v. Snyder, 58 Pac., 780; 8 Okl., 659; Wiseman v. Eastman, 21 Wash., 163; Paine v. Foster, 9 Ock., 257). Thus, a decision by the Land

Department rejecting a person's claim to pre-empt certain land, upon evidence that he had previously exercised the pre-emption right, is binding and conclusive (Baldwin v. Stark, 107 U. S., 463). So, a finding by this Department that a homestead claimant to lands in Oklahoma, entered the Territory prior to the time fixed by the statute and the President's proclamation pursuant thereto (25 Stat., 980), is a finding of fact, which is not reviewable by the courts (Calhoun v. Violet, 173 U. S., 60).

The Court below also say that the cancellation of a mineral entry does not imply that the location is void, or fully adjudicate the possessory rights of the applicant. We have not suggested any such thing. We do not rely upon the mere cancellation of an entry. Back of such cancellation there was a *trial of a distinct issue of fact*, and an adjudication that appellees had *not made a discovery of a vein*. All we are asking is that this adjudication shall be respected. Suppose appellees, without doing any more development or attempting to make any further discovery, had made this second application for a patent, can there be any doubt that a court, when these decisions were brought to its attention in an adverse proceeding, would be bound to instruct a jury that they were not entitled to the land in controversy? In an adverse proceeding each party must stand upon his own title. To make out his title he cannot be permitted to attack and overthrow adjudications of the Department as to a specific issue of fact. Our plea does not go to any rights the defendants in error may have by virtue of any other fact than the one expressly tried and determined.

But it is said that as appellant was a mere *pro-*

testant in the Land Department, and not, as they claim, a technical party to the controversy, a court will pay no attention to these decisions. The protest was filed in order to protect the rights of appellant. He was permitted to appeal from the decision of the local land officers to the Commissioner of the General Land Office. Being a party in interest he *had the right of appeal* (Bright v. Elkhorn Co., 8 Land Dec., 122; *In re* Nevada Lode, 16 *Id.*, 532; Mor. Min. Rights (8th ed.), 381). He was, therefore, technically speaking, a party to the record.

But we do not admit that it is only a technical party who can take advantage of these decisions. Appellant holds in privity with the Government of the United States. He has acquired rights by virtue of a compliance with its laws. To protect those rights he has, in one of the modes provided by Congress, caused it to be adjudicated that defendants in error had not, prior to October 11, 1893, made a discovery of a vein in the Ophir shaft; and it would be strange if he cannot, to protect his same rights, invoke these decisions. Under the Act of Congress requiring both parties to prove their title, and providing that a finding and judgment may go against both, we submit that it would be the duty of a court to enforce decisions of this character, affecting the title of either party to an adverse proceeding, whether they were specially pleaded or not.

The entire testimony of defendants in error was directed to showing that there was a discovery in the Ophir shaft made in 1892. That a discovery was made in 1895 in this shaft stood admitted. But to ante date the discovery in the

Tecumseh, made in 1894, it was necessary to show a discovery in the twenty-five foot shaft of the Ophir which was passed upon by the Department. It must be constantly borne in mind that no work was done in the Ophir shaft from 1892 to 1895. If defendants had relied wholly on a discovery made in 1895, these decisions, would have no application to the case. But when they undertake to put a discovery in this shaft ante dating the time passed upon by the Department, they are attacking decisions which are unassailable in this manner; and this is clearly a Federal question.

II.

Estopped in Pais.

By another part of our replication we set up an estoppel *in pais*. It is set forth in full in the assignment of errors. The testimony of a witness may work an estoppel the same as any other representation (Smith v. Chicago & N. W. Ry. Co., 73 N. W., 581; 104 Iowa, 147).

This testimony related to a material fact. It was not given as an opinion. Mr. Cone was supposed to know the fact before he testified to it. He had just examined this shaft. If he did not know whether there was a *vein* or a well defined crevice in the shaft, he was grossly negligent to give the testimony he did, which would carry all the more weight in that it was against himself. Gross negligence supplies the place of want of knowledge (Griffith v. Wright, 6 Colo., 248; 11 Amer. & Eng. Enc. Law (2d ed.), p. 433).

The Court holds that plaintiff in error must have been ignorant of the truth in order to assert

an estoppel. It is alleged that he was ignorant of the fact as they now allege it to be. He had never examined the shaft, and had no reason to doubt the truth of Cone's testimony. The appellees are presumed to have intended the natural and probable consequence of their act. The natural consequence of such testimony as that given by Mr. Cone would be to induce reliance and action upon it; but an actual intent that it should be relied upon, was not, under all the allegations of this plea, necessary in order to work an estoppel. For Mr. Cone to testify that he had no vein, and then remain silent with knowledge that appellant was expending between ten and fifteen thousand dollars on the faith of such testimony, and thereafter be permitted to say his testimony was either false or mistaken, would work a fraud on the party setting up the estoppel in this case. These facts, all of which are distinctly alleged, supply the place of actual intent (Griffith v. Wright, 6 Colo., 248). That this testimony would naturally induce credence is evident from the fact that the decisions of the Commissioner and Secretary were largely based thereon (Record, folios 721-743).

The Court placed its original decision on the ground that the plea does not directly allege that the statement relied upon to constitute the estoppel was made with the *intention that it should be acted upon*, and cites Patterson v. Hitchcock (3 Colo., 533), to support its position. In the case cited the Court says:

> **"The fourth is true with the qualification that gross and culpable negligence upon the part of the party sought to be estopped, the effect of which is to work a fraud on the party setting up the estoppel, *supplies the place of intent.*"**

This qualification of the general rule in regard to intention is again recognized in Griffith v. Wright (6 Colo., 248), and in Birch v. Streppler (11 Colo., 400). We submit that our plea meets the rule as thus qualified.

The Court does not, in its opinion, state the substance of the entire plea. It alleges that defendants knew at all times that plaintiff was making the expenditures on the faith of the truth of the testimony, which was relied upon as a ground of estoppel and never contradicted the same; and that to permit the defendants to now dispute the truth of said testimony would work a fraud on plaintiff. It is not alleged, in express terms, that defendant was guilty of gross and culpable negligence. Such an allegation is not necessary where facts are alleged from which gross and culpable negligence must be inferred.

Mr. Estee (2 Pl., Sec. 2010, 4th ed.), states the rule as follows:

"Negligence is a question of fact, or mixed law and fact; and in pleading it has been held only necessary to aver negligence generally, not the specific facts, constituting negligence. It is always safer, however, to allege the facts constituting the negligence. And where the negligence consists in the omission of a duty, the facts which are relied on must be alleged."

We know of no authority to the effect that where the specific facts showing the negligence are alleged, there must, also, be a general allegation of negligence. We submit that it is morally and rationally impossible for any Court to declare, as a question of law, that it is not grossly and culpably negligent for a man who has testified to a fact to stand by and see another man expend a large sum of money with full knowledge that he is

doing so on the faith of the truth of such testimony, and not give him notice that his testimony was erroneous. To do this, and then dispute his former testimony, with the view and effect of taking the benefit of such expenditure, is a fraud that no court of conscience can tolerate.

We have presented this question with great doubt as to whether the same is a Federal question. As this testimony was given in a Federal tribunal, acting under the laws of the United States, and with reference to property of the United States, it would seem to be proper that the Federal courts should adjudicate with reference to the force and effect thereof upon the parties thereto; but, as to whether this is correct, we are in doubt.

III.

Decisions of the Secretary.

The decisions of the Secretary of the Interior were admissible as evidence. (Kreckeler v. Ritter, 62 N. Y., 372; Taylor v. Field, 22 Ill. App., 436; Sauce v. Shaughnessey, 33 N. Y. Sup., 517; Babcock v. Kemp, 12 Ohio St., 11.) The Department is not bound by the result of this case. (Perigo v. Dodge, 163 U. S., 160; Doe v. Waterloo M. Co., 70 Fed., 455; Min. Law Dig., pp. 195, 308 and 309.) The State Courts are bound by these decisions. (Carr v. Fife, 44 Fed., 713; Aurora Hill Con. Min. Co. v. 85 Mining Co., 34 Fed., 515; Marquez v. Frisbie, 101 U. S. Rep., 473; Smelting Co. v. Kemp, 104 U. S., 636; Quinby v. Conlan, 104 U. S., 420; Steel v. Smelting Co., 106 U. S., 447; Parsons v. Venzke, 61 N. W., 1036; Shepley v. Cowan, 91 U. S., 330; United States v. Minon, 114 U. S., 233; Bauld-

win v. Stark, 107 U. S., 463; Vance v. Burbank, 101 U. S., 514; Heath v. Wallace, 138 U. S., 573; Lee v. Johnson, 116 U. S., 48; Mineral Law Digest, 445; Justice Min. Co. v. Lee, 21 Colo., 260.)

If these decisions were competent for any purpose they should have been admitted in evidence, and their *effect* controlled by proper instructions. The courts have held that, in an adverse suit, a party, in order to make out a *prima facie* case, must show that he has made a valid location on the unoccupied public domain. (Becker v. Pugh, 9 Colo., 589; Bryan v. McCaig, 10 Colo., 309; Girard v. Carson, 22 Colo., 345.) When the Secretary of the Interior adjudicated that defendants in error had **not,** on October 11, 1893, made any discovery, he established the *status* of this ground upon that day. It was thereby declared that the same was a part of the public domain. What better authority could any citizen of the United States have to enter upon a part of the supposed public domain than these decisions.

The Secretary, in his first decision said:

"Cone admits, in answer to a direct question on cross-examination, that no vein has been discovered in the Ophir Counsel for claimants presents an elaborate argument with the view of showing that the character of the alleged discovery of mineral is sufficient upon which to base a valid location in that mining district, and enters into a long discussion of the meaning applied by the courts to the term vein. I do not deem it necessary to go into a discussion on this subject in the case at bar. It is sufficient to say there must be a discovery of a vein or lode of quartz or other rock in place bearing gold, silver, etc., in order to make a location of or secure a patent for public lands under the mining statutes." (Record, folio 724.)

And the Secretary, upon a petition for rehearing, said:

"But I think it may with propriety be said that Section 2320 (Revised Statutes) specifically provides that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.' Section 2401 (General Statutes of Colorado), in defining what shall be done to make a mining location, says: 'A discovery shaft (shall be sunk) upon the *lode* to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice.' [The charge here was that there had been 'no discovery of any lode, vein, ledge or deposit,' and in the notice issued this charge was copied. This is the issue, therefore, the lode claimants were required to meet. The defendant, Cone, admitted on the stand that there was no vein in the Ophir and there was no attempt made to show that any other form of deposit existed, except that by an assay certificate it was shown that mineral was found of the value of $4.50 per ton. By another certificate, however, introduced by the protestants, it is shown that there was no mineral in the specimen that he had assayed. But whatever might be the conclusion from the evidence, it cannot be controverted that there was no evidence to show that the location had been made in conformity with the statutory requirements" (Record, folio 736-738).

In German Ins. Co. v. Hayden (21 Colo., 127), the Court, in holding that a decision of the Land Department, made upon a protest, established the status of the land in question, and that a third party, in no way connected with the cause, could take advantage of such decision, said:

"In the present instance, the title failed by reason of an inherent infirmity—the land not being mineral land, and consequently not open to entry under the mining laws of the United States. The character of this land was a question of fact, the determination of which is specially committed to the appropriate officers of the Land Department of the government, and their decision in all cases within their jurisdiction is final and conclusive, in the absence of fraud. Lindsey v. Hawes, 2 Black., 554; Lee v. Johnson, 116 U. S., 48; Vance v. Burbank, 101 U. S., 514. It is claimed, however, in this case, that the land officers were acting without jurisdiction. This claim is based upon the as-

sumption that a protestant has no right of appeal, and upon a further claim that by the protest filed only a small portion of the placer claim was involved, the buildings not being upon such portion. The answer to this claim will be found in the statutes. By section 2329 of the Revised Statutes of the United States it is provided that a placer claim is 'subject to entry and patent under like circumstances and conditions and upon proceedings as are provided for vein or lode claims.' In section 2325 provision is made with reference to lode claims as followes: 'If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the appellant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, '*except it may be shown that the applicant has failed to comply with the terms of this chapter.*' The standing of the protestant seems to be regulated by the exception in the paragraph last quoted. The statement that he is not a party and therefore not entitled to appeal is immaterial to the real question at issue."

We think there can be no question but that it is the province of this Court to determine whether these decisions are admissible in evidence to show that this ground, on October 11, 1893, was open to location.

IV.

Annual Labor.

One of the questions raised at the trial was as to whether the defendants below had performed labor or made improvements of the value of one hundred dollars on the Ophir claim for the year 1897. For defendants Mr. Skipworth testified that he ran a drift seven or eight feet, and that it was worth twelve dollars per foot to do so. This would be less than one hundred dollars. Mr. Cone testi-

fied as to what he *paid* for this work, and made the amount more than one hundred dollars; but this was not legal evidence (Quinby v. Boyd, 8 Colo., 194; s. c. *Id.*, 432).

The Act of Congress provides that—

"On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. * * * And, upon a failure to comply with these conditions, the claim or mine upon which such failure accurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the originial locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Under the plain letter of this act the true test is the "worth" of the labor or improvements, and not what was actually paid therefor. There was not a scintilla of evidence that this labor was worth one hundred dollars, while there was conclusive evidence that it was not worth more than fifty-six dollars. There was, therefore, no evidence to sustain the verdict. The verdict recited:

"And we further find that they have established their title and right to the possession and occupancy of the premises in controversy by reason of a full compliance with the Acts of Congress and the laws of the State of Colorado relating thereto."

The Supreme Court of Colorado places its decision on this point upon three grounds: (1.) That there was some evidence that this labor was worth one hundred dollars. (2.) That an instruction given by the trial Court to the effect that the law presumes that such labor was performed was correct. (3.) That in the absence of a relocation it is wholly immaterial whether any annual

labor was performed or not. We think the Court erred on all of these points, for the reasons: (1.) There was no legal evidence that the labor for 1897 was worth one hundred dollars. (2.) There is no legal presumption that labor to this amount was done. It is incumbent on an applicant for patent to show a compliance with the statute (Rev. Stat., Sec. 2324) in regard to annual labor (8 L. D., 505). The pending of an adverse claim, *before entry*, does not excuse the non-performance of annual labor (Sickle, 371; Morrison Min. Rights, 10th ed., 427).

Under the Act of Congress, of March 3, 1881, authorizing the jury to find that the title to the ground in controversy has not been established by either party, each party must *affirmatively* establish his right and title. This cannot be done by a presumption. The Act provides:

"That if in any action brought in pursuance of section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be extended according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the Land Office, or be entitled to a patent for the ground in controversy, until he shall have perfected his title."

To say that, under the above act, the important fact of the performance of annual labor may be established by a presumption is inconsistent with the former decisions of the Court below (Becker v. Pugh, 9 Colo., 589; Bryan v. McCaig, 10 Colo, 309; Gerard v. Carson, 22 Colo., 345), and operates as a nullification of the Act of Congress requiring each party to establish his title. And for the Court below to say that annual labor need not be performed, after a valid location has been made, in order to be entitled to the verdict and

judgment which were rendered and entered in this cause, was to nullify the other Act of Congress referred to which requires such annual labor until patent has issued. Some courts have held that annual labor need not be performed after entry, because the patent, when issued, relates back to the entry; but in this case no entry has been made. But, whatever view may be finally taken of this question, there can be no doubt but that its proper solution requires a construction of these Acts of Congress, and that they were constructed, either expressly or impliedly, by the Court below, adversely to plaintiff in error. This is all that is required to give this Court jurisdiction.

V.

Place of Discovery.

The Act of Congress provides:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim." (R. S., Sec. 2320.)

We claimed that, under and by virtue of this statute, we were entitled, after showing a well-defined crevice in the Tecumseh discovery shaft, to show and rely upon two other *admitted discoveries* in shafts other than the discovery shaft, but within the limits of our claim. The Act of Congress authorizes a location to be made upon a discovery within the limits of the claim. This is the clear implication.

There are decisions that plainly hold that there need be no discovery in the discovery shaft, and that a discovery anywhere within the limits of the claim is sufficient. (North Noonday Min. Co.

v. Orient Min. Co., 1 Fed., 522; 6 Saw., 299; Chambers v. Harrington, 3 Utah, 94; Wight v. Tabor, 2 Land Dec., 738; same case *Id.*, 743; O'Donnell v. Glenn, 8 Mont., 248).

In Wight v. Tabor (2 Land Dec., 725), Mr. Teller, as Secretary of the Interior, said:

"On eqamination of all the testimony, I am satisfied that there was *no mineral in place in the discovery shaft;* but I am satisfied that before other parties had acquired rights in conflict with the rights of applicants that they had discovered mineral within the boundaries of the original location" (2 Land Dec., 743).

The evidence in the Wight v. Tabor case showed that while there was a second location of the Maid of Erin made after the alleged discovery in the working shaft, it was made upon the old discovery shaft. We will not quote further from this decision, but we ask the Court to give it a careful consideration. We have, however, made no contention to the full extent of this decision.

The state statute provides as follows:

"Before filing such location certificate, the discoverer shall locate his claim by 'first sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice."

To require this crevice, as disclosed in the discovery shaft, to contain a vein, and then to exclude and disregard all discoveries of veins elsewhere, within the limits of the claim, is to give this state statute a construction which brings it into conflict with the Act of Congress. This is what the Court below did, and thereupon a Federal question is clearly presented.

VI.

What is a Vein?

We claimed title to the land in controversy on the ground that the Ophir discovery shaft (and this was the only shaft on the Ophir) did not, at the depth of twenty-five feet, disclose a vein within the meaning of the Act of Congress. A vein was disclosed in this shaft at the depth of thirty-four feet, but this was not done until 1895. This discovery in 1895 was of no avail because of the discoveries in the Tecumseh in the spring of 1894. It was necessary to go back of 1894 and iuject into the Ophir shaft a vein the discovery of which antedated the hearing in the Land Department. This had to be done and was permitted to be done upon evidence that showed no fissure, no crevice, no walls of a vein, no wall of a vein, and nothing, (even as claimed by defendants in error) but an *impregnation.*

The plain declaration of the Act of Congress is that no location shall be made until the discovery of a vein within the limits of the claim. The exact *place* of the vein, and its relation to the boundaries of the claim, are not so material. All that is required is that it shall be discovered within the *limits* of the claim. But as to *what* shall be discovered the act is peremptory. Indications of the proximity of a vein are not sufficient. The vein itself must be discovered. There have been many judicial and scientific definitions of veins. We will quote a few of them:

"A vein is an 'aggregation of mineral matter in fissures of rock'." (Bainbridge on Mines, p. 2.)

"The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineral matter, or more accurately, an aggregation of mineral matter, containing ores in fissures." (Van Cotta, 26.)

"A lode is a mineral body in the general mass of the mountain." (Iron Silver M. Co. v. Cheeseman, 2 McCrary, 191; 9 Mor. Min. Rep., 552.)

"The terms 'vein,' 'lode,' and 'ledge,' are supposed to be nearly synonymous, and mean a continuous body of mineral-bearing rock within defined boundaries in the general mass of the mountain." (*Id*.)

"A vien or lode authorised to be located is a seam or fissure in the earth's crust filled with quartz or some other rock in place carrying gold, silver or other mineral deposits named in the statute." (North Noonday M. Co. v. Orient M. Co., 1 Fed., 522; Iron Silver M. Co. v. Cheeseman, 116 U. S., 529.)

"A vein or lode is 'any zone or belt of mineralized rock lying within bonndaries clearly separating it from the neighboring rock'." (Iron Silver M. Co. v. Cheeseman, 116, U. S. 529.)

"To constitute a vein 'something must be found in place, as rock, clay or earth, so colored, stained, changed and decomposed by the mineral elements as to mark and distinguish it from the inclosing country." (Burke v. McDonald, 2 Ida., 646; 33 Pac., 49.)

"A lode or vein is a body of mineral or mineral-bearing rock, within defined boundaries, in the general mass of the mountain. In this definition, the elements are the body of mineral or mineral bearing rock, and the boundaries. With either of these things established, very slight evidence may be accepted as to the existence of the other." (Hyman v. Wheeler, 29 Fed., 347.)

"By 'veins' or 'lodes' * * * are meant lines or aggregations of metal imbedded in quartz or other rock in place." (United States v. Iron Silver M. Co., 128 U. S, 673.)

"A vien or lode authorised to be located is a seam or fissure in the earth's crust, filled with quartz or some other kind of rock in place, carrying gold, silver or other valnable mineral deposits named in the statute. * * * It must be more than detached pieces of quartz or mere bunches of quartz not in place." (Jupiter M. Co. v. Bodie Con. M. Co., 11 Fed., 666.)

"A vein is 'any zone or belt of mineral rock lying within boundaries clearly separating it from neighboring rock." (Cheeseman v. Shreeve, 40 Fed., 787.)

"Ore disseminated at intervals or found in channels, chutes, cavities, pockets or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode or vein within the meaning of the statute." (Cheeseman v. Shreeve, 40 Fed., 787.)

"In general, it may be said that a lode or vein is a body of mineral—body of rock, within defined boundaries, in the general mass of the mountain." (Stevens v. Williams, 1 McCrary, 480; approved in Iron Silver M. Co. v. Cheeseman, 116 U. S., 529.)

"A vein is defined as a 'lead or lode of ore-bearing rock, alive or dead—that is, containing ore or not,' and as a 'seam of metalliferous matter filling up a former fissure in rock." (4 Enc. Dic., title vein.)

The thinner portions (of veins) often branch off into innumerable slender ramifications like the veins of an animal, whence their name." (*Id.*)

"The Act of Congress declares that 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." (Min Law Dig., p. 2.)

"The object of this provision is to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists." (*Id.*)

"Under our State statute, a discovery shaft must be sunk ten feet deep and deeper 'if necessary to show a well-defined crevice'."

"While the discovery shaft must reach a well-defined crevice, the mineral-bearing vein may be found anywhere on the claim." (Min. Law Dig., p. 410; Wight v. Tabor, 2 L. D., 741.)

"A location can only rest upon an actual discovery of the vein or lode." (King v. Amy & Silversmith M. Co., 152 U. S. 222.) "A location, without a discovery, does not segregate the territory from the public domain." (Armstrong v. Lower, 6 Colo., 393; affirmed 6 Colo., 581; Johnson v. Young, 18 *Id.*, 628.)

"Evidence of a discovery must be clear and positive. (Min. Law Dig., p. 410; Robert S. Hale, 3 L D., 536; Silver Tennie lode, 7 L. D., 6.) Must show all the details of a location, such as notices, posts, stakes, etc. (Becker v. Pugh, 17 Colo., 243.) Must prove compliance with State and Federal statutes and miner's rules and regulations. (Becker v. Pugh, 9 Colo., 589.) Defendants must prove

all the elements essential to title. (Bryan v. McCaig, 10 Colo., 309; Min. Law Dig., p. 408.) Certificate of location does not establish discovery. (Min. Law Dig., p. 404.) Failure to prove citizenship is fatal. (O'Reilly v. Campbell, 116 U. S., 418.) Affidavits of annual labor are admissible. (McGinnis v. Egbert, 8 Colo., 41.) The testimony of Cone may be used against defendants. (Clayton v. Clayton, 4 Colo., 417; Budde v. Spangler, 12 *Id.*, 216, 223.) But there is no question of burden of proof in the case. (Becker v. Pugh, 17 Colo., 242.)

The vein in the Ophir shaft, when discovered in 1895, at the depth of 34 feet, was a well-defined fissure vein. There was no necessity for appealing to any of the loose definitions or strained constructions that are sometimes employed with reference to blanket veins or irregular deposits of mineral. No work had been done between 1892 and 1895. In 1895 the vein was clearly disclosed by sinking the Ophir shaft from the depth of 25 feet, a depth reached in 1892 (at which point it was examined and passed upon by the Land Department as of October 11, 1893), to a depth of 34 feet. The vein was approached on its dip. The hanging wall was first reached.

Now in order to antedate the several discoveries made in the Tecumseh in 1894 (fully a year before this vein was reached in the Ophir in 1895), it was necessary to travel through 9 feet of country rock, and carry this vein up to a point within 25 feet of the surface. Cone had testified in 1893, before the Land Office that there was no vein in the Ophir. He further said that if there was anything in the Ophir shaft that looked like a vein, or that might develop into a vein, it was a slip in a certain corner of the shaft. This slip turned out to be nothing but a slip, and when, in 1895, the the vein was uncovered it was in a corner diagon-

ally across the shaft from where this supposed *slip* was said to be. So that, if any vein had been reached in the Ophir, prior to 1895, no one knew it or claimed it.

But in order to defeat the Tecumseh it became necessary to trace this vein in the shaft up to where work stopped in 1892. It is not material to this application for a writ of error to show how this was done; how they utilized perjury; how they packed a jury; how they "salted" the Ophir shaft; how, in short they stole this mine, if indeed, this verdict and judgment shall be permitted to stand. It is sufficient, for the purpose now in view, to say that on all the evidence in the case, on their own evidence, and on the evidence of any one of their own witnesses, no crevice had been disclosed, no wall of a vein had been reached, and no point had been reached which, upon future development, was shown to have been within the walls or boundaries of a vein. The Act of Congress was, when properly construed, actually ignored.

It was not claimed by the defendants that prior to 1895, any actual well-defined crevice was disclosed in the Ophir discovery shaft. It is sought to maintain their alleged discovery upon the theory that this shaft was at that time sunk near such a crevice; that the country rock was somewhat impregnated with mineral from such crevice, and that this impregnation reached into the shaft. The theory upon which the Court refused instructions, and gave instructions to the jury, was that the discovery of this impregnation, which might or might not be in close proximity to a crevice, amounted, in contemplation of law, to a discovery of the crevice itself. We do not under-

stand this to be the law. (Strepey v. Stark, 7 Colo., 618; Bryan v. McCaig, 10 Colo., 313; Van Zandt v. Argentine Mining Co., 8 Fed., 727.) The instructions given by the Court, taken in connection with the refusal of the instructions asked by plaintiff, operated as an absolute nullification of both the State Statute and the Act of Congress. To say that the discovery of a mere impregnation, that is years afterwards shown to have been in proximity to a crevice, is the discovery of a well defined crevice, is to disregard both the ordinary and technical meaning of the language of the statute, and to ignore the purpose for which the statute was made. One of the purposes of this statute was to enable the prospector, by examining the shaft, to see whether anything had been done that amounted to an appropriation of a part of the public domain. If a well defined crevice appeared in a shaft, any miner or prospector could see it. This would clearly put him upon further inquiry to ascertain whether or not this crevice contained a mineral-bearing vein. But where a shaft only twenty-five feet deep contains no crevice, he is not to suppose that any discovery has been made for the reason that the first and most important requirement of the statute has not been complied with.

The charge of the Court was quite lengthy and amounted to quite a treatise on mining law in general. Many of its propositions were purely abstract in their nature and had really no application to the evidence concerning either the Tecumseh or the Ophir lode. The instructions in mining cases should apply to the particular formations as shown by the evidence. (Book v. Justice Mining Co., 58 Fed., 106; Hyman v. Wheeler, 29

Fed., 347.) All of the evidence in this case shows that the veins in controversy, and indeed all the veins in the neighborhood of these properties, were *true fissure veins*, and yet the Court entered into a full discussion of the law as applicable to blanket veins, deposits and all other formations where mineral is sometimes found.

We call attention to the third instruction given by the Court. The Court states:

"While the vein must be found in rock in place, that is, separated by defined boundaries from the general mass of the mountain, it is not necessary that it should have these characteristics at the surface, or that it should be theoretically perfect in all respects as to all these characteristics. If the vein in continuing down passes or is included within walls of rock in place, it is a sufficent discovery if it is sufficient in other particulars—that is, containing mineralized rock bearing appreciable quantities of precious metal. Theoretically a vein must have two walls which clearly separate it from the general mass of the mountain; but for the purposes of this case you are instructed that if there is a body of mineralized rock containing appreciable quantities of some of the metals, and if it is found in place, it is not necessary that it should have two well defined walls. It is for practical purposes a vein if the mineralized body of rock or the body of mineral is found in the general mass of the mountain, and if it continues unbroken and without interruption it is regarded as a vein whatever the boundaries may be, and if it contains such a showing of mineral in connection therewith as that a competent miner would be willing to follow it in prospecting in the expectation of reaching thereby richer or larger quantities of ore beyond."

This instruction was intended to apply to both the Tecumseh and Ophir lodes. It was not specially directed to either. An examination of the evidence will show that there were well-defined

fissures in three different shafts on the Tecumseh lode in the spring of 1894. The only serious question as to the Tecumseh lode was as to whether these fissures as disclosed in the discovery shaft were mineral bearing. All of the witnesses on the part of the defendants agreed that if these fissures bear mineral in appreciable quantities, they would be veins. On the other hand, the evidence was clear and certain that there was no fissure disclosed in the Ophir shaft until the summer of 1895. Up to the summer of 1895 the Ophir shaft was from 25 to 28 feet deep. The great bulk of the testimony showed it to be about 25 feet deep, while the utmost claim of any witness for the defendants was for a depth of 28 feet. It was claimed by no witness for the defendants that there was a well-defined crevice disclosed in the Ophir shaft. The claim and the only claim that was made, as we have heretofore stated, was that there was an impregnation that extended into the shaft from the upper side of the vein that was subsequently shown to be in close proximity to the shaft. This third instruction was not applicable to this state of facts. The Court declares that it is not necessary to a discovery that two well-defined walls are found, but here no wall had been found, and subsequent development shows that at the depth of twenty-five or twenty-eight feet from the surface the Ophir shaft must have been two or three feet distant from the hanging wall of the vein, even if such vein continues on its regular dip up to a point on a level with the bottom of the Ophir shaft as it stood prior to 1895. When this vein was reached, it was discovered to be a true fissure vein with two well-de-

fined walls. It was not necessary to give any instructions that could be applied to the Ophir shaft except such as distinctly applied to a true fissure vein. The question was as to whether this fissure vein had been discovered in 1892 in the Ophir shaft, for it stood admitted that no work had been done upon this shaft from 1892, to the summer of 1895. The simple question was as to whether the discovery that country rock was somewhat impregnated with mineral and which by explorations three years afterwards was found to be within a few feet of the fissure, amounted in law to a discovery of that fissure. The shaft itself did not disclose the fissure. Upon the hearing before the Land Office, Mr. Cone, one of the defendants, was claiming that a slip in the porphyry upon the other side of the shaft was or might possibly be afterwards shown to be a fissure. This was their claim as to this shaft until the summer of 1895, when, the shaft being sunk to a depth of thirty-four feet, the crevice was broken into and from this point down to the botton of the shaft a well-defined crevice was disclosed. This third instruction, read in the light of the evidence, was clearly intended to allow the jury to find for the defendants wholly irrespective of the existence of any well-defined crevice or any crevice of any kind in the Ophir shaft. The evidence showed that these impregnations of county rock are very often found at great distances from any vein and sometimes irrespective of any vein. To say that a discovery of an impregnation or of country rock somewhat impregnated with mineral is the discovery of a fissure that exists in one direction or the other and at an uncertain distance from the

shaft is to render the statute which requires the discovery of a well-defined fissure entirely nugatory. The question was whether a vein or well-defined crevice was disclosed and discovered in the Ophir shaft in 1892. It is well settled that this discovery can not be established by developments made three years later and after the discovery had been made in the Tecumseh. (Upton v. Larkin, 7 Mont., 449; s. c., 5 Mont., 600.)

The same erroneous view of the law appears throughout the succeeding instructions. In the fourth instruction the Court said:

"And in this connection in this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode or vein, whatever the boundaries may be. On the other hand, with well-defined boundaries, very slight evidence of such mineral would be sufficient to establish the existence of a lode. Such boundaries constitute a fissure, and if in such fissure mineral is found, although in small quantities, it may be called a lode or vein."

This instruction is not applicable to any state of facts found in the Ophir shaft prior to the discovery in the Tecumseh. No witness on either side of the cause undertook to establish by assay or any other test that there was any body of mineral in the Ophir shaft prior to the resumption of work in 1895, that continued unbroken and without interruption for any distance or in any direction. In declaring that well-defined boundaries would constitute a fissure, the

Court wholly ignors the question as to the nature of those boundaries or as to how such boundaries are ascertainable. This instruction was construed, and was intended to be construed, as authorizing well-defined boundaries to be established by assays alone. As applicable to the Ophir shaft, it authorized the jury to ascertain and determine that a vein existed in the same if any country rock found in that shaft would assay to any appreciable value. The evidence in this case tended to show that frequently the country rock in places would give an appreciable assay without being distinguishable by the naked eye from the balance of such country rock which would not assay. These instructions, taken as a whole, went upon the theory that the discovery of country rock which would assay was the discovery and disclosure of a well-defined fissure. While the boundaries could not be seen, the assay would give rise to the presumption that there were boundaries according to these instructions, and these presumptive boundaries are made to create the fissure, and the fissure is again conclusively presumed to be a well-defined fissure. By the fifth instruction the Court expressly authorizes this well-defined fissure contemplated by the statute to be one that is discoverable alone by assays. But there is not a *scintilla* of evidence in this case that, prior to 1895, there was any body of mineral in the Ophir shaft that had been or could be established by showing the difference between the walls and the mineral-bearing rock by assays or otherwise. Indeed, subsequent developments show that the shaft was entirely to one side of the vein that subsequently appeared therein. The shaft had not reached any point disclosing either, much

less both of the boundaries of the vein. Hence, such boundaries could not be discoverable in that shaft by assay or in any other manner.

By the sixth instruction the jury was told that:

"'A continuous body of mineral or mineral-bearing rock, extending through loose, disjointed rocks, is a lode as fully as that which is found in the same rock formations.' This we think was erroneous." (Waterloo Co. v. Doe, 56 Fed., 685.)

In this connection, we may as well notice the sixteenth instruction, which reads as follows:

"The term 'well-defined crevice' as used in the statute, is intented to mean a vein or lode or ledge of mineral-bearing rock between walls. In its practical application, however, it must be considered in connection with the character of the mineral deposit which is the subject of location. If the lode is very wide or is horizontal, or exists with boundaries ascertainable by assay or analyses, then a discovery shaft sunk into or upon or through the same at a distance of ten feet or more below the surface is, in effect, the exposure of such a well defined crevice as the law requires, for, were it otherwise, many metalliferous ores or deposits could not be located or appropriated at all."

This instruction was wholly inapplicable to either of the lodes in controversy. The Tecumseh lode had well-defined, visible crevices, and the only question was whether they were mineral-bearing or not. The Ophir lode when found at a depth of 34 feet, was a well-defined crevice. But the question for the jury to determine was whether it was found in 1892 or only in 1895, after the discovery in the Tecumseh. There was no necessity or propriety in instructing the jury as to those classes of metalliferous lodes which do not contain crevices or veins proper. If there was anything discovered on

either of these lodes in controversy, it was a well-defined, true fissure vein, and the sole question for the jury to determine as to the Ophir lode was whether that kind of a vein was disclosed in the Ophir shaft prior to the same kind of a vein being disclosed in the Tecumseh shaft. The instruction should have been directed to and based upon the facts as they were disclosed in these different shafts. This instruction permitted the jury, by applying exceptional doctrines that of necessity are employed in aid of the letter of the law to such lodes as do not come within such letter, to find that a well-defined crevice within the meaning of our State statute, and a vein within the meaning ing of the Act of Congress, was found in the Ophir shaft in 1892, notwithstanding all of the evidence demonstrated that the thing in controversy was a well-defined visible crevice, and that the same was not disclosed until 1895.

We think we have shown that the entire theory upon which this cause was tried, insofar as it affected the Ophir shaft, was one that was wholly inconsistent with the Act of Congress which requires a vein to be discovered before a location can be or become a valid one. A Federal question therefore arises. It is immaterial, as affecting the jurisdiction of this Court, as to how, or at what stage of a cause, such question arises. A defense based upon laws of the United States gives rise to a Federal question as much as a claim asserted in a complaint. (Anderson v. Clarkins, 135 U. S., 483; Murdock v. Memphis, 20 Wall., 590.) Where one party is a pre-emptor and the other a railroad acting under an an Act of Congress, a Federal case arises. (Spokane Falls, etc., R. R. Co. v.

Zeigler, 167 U. S., 65; Florida, etc., R. R. Co. v. Bell, 87 Fed., 369.)

In the case at bar both parties claim the same parcel of the public domain of the United States, by virtue of a compliance with the laws of the United States and the State of Colorado. Insofar as a question fairly arises as to whether either party has complied with the laws of the United States a Federal question is necessarily presented. This would seem to be plain and certain for the simple reason that in order to determine any such question the laws of the United States must be construed and their meaning and intent ascertained and declared.

We therefore, respectfully submit that we are entitled to the writ of error prayed for.

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